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CONTENTS

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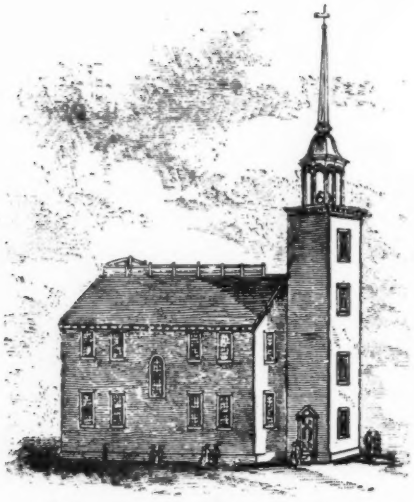
MARCHES ON

(From the Boston Post of September 17, 1937.)

1787–1937

IN COMMEMORATION OF THE ONE HUNDRED AND FIFTIETH ANNIVERSARY OF THE SIGNING OF THE CONSTITUTION OF THE UNITED STATES.



FEDERAL STREET CHURCH, BOSTON.

". . . When virtuous things proceed
The place is dignified by the doer's deed."
—*All's Well that Ends Well.* Act II, Sc. 3.

On the site of the building of the Boston Chamber of Commerce stood the old Meeting-house in "Long Lane" where the Massachusetts Convention was held which debated and ratified the Federal Constitution in 1788. The name was changed to Federal Street the day after ratification.

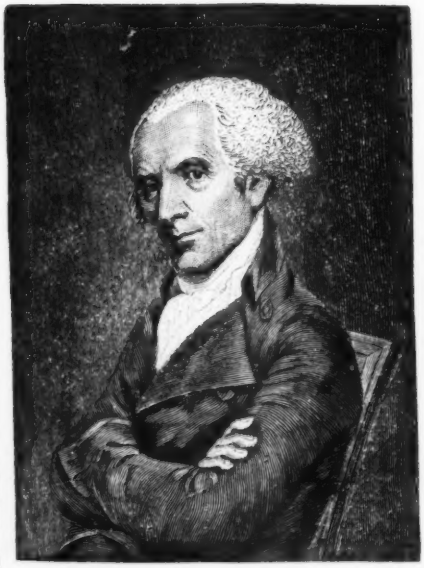
THE MASSACHUSETTS DELEGATES TO THE PHILADELPHIA CONVENTION OF 1787.

Francis Dana,* Elbridge Gerry, Nathaniel Gorham, Rufus King, and Caleb Strong were appointed delegates by the General Court and commissioned by the Governor under a resolve of the Congress on the 21st day of February, A. D. 1787, "That, in the opinion of Congress, it is expedient that, on the second Monday in May next, a Convention of Delegates, who shall have been appointed by the several States, to be held at Philadelphia, for the sole and express purpose of revising the Articles of Confederation, and reporting to Congress, and the several Legislatures,

* Francis Dana, who was then a Justice of the Supreme Judicial Court, was unable to attend because of his health, and the fact that it would interfere with his judicial duties. He was, however, an active member of the Massachusetts Convention which ratified the Constitution.

Nath. Gorham

Caleb Strong



Elbridge Gerry

Rufus King

THE MASSACHUSETTS DELEGATES TO THE PHILADELPHIA CONVENTION OF 1787 WHICH FRAMED THE CONSTITUTION OF THE UNITED STATES.

such alterations and provisions therein as shall, when agreed to in Congress, and confirmed by the States, render the Federal Constitution adequate to the exigencies of Government and the preservation of the Union."

Nathaniel Gorham was born in Charlestown, Mass., in 1738 and died in 1796. He was about 49 years old at the time of the Philadelphia Convention and "when that body went in to a committee of the whole" he "was called by Washington to the chair, no doubt on account of his legislative experience and skill as a parliamentarian, and in that capacity served for three-fourths of the time that the Convention was in session." (Carson "The 100th Anniversary of the Constitution of the United States" Vol. I, 147.) He was also an influential member of the Massachusetts Convention.

Elbridge Gerry of Cambridge, Mass., was born in Marblehead in 1744 and died in November, 1814, while holding the office of Vice-President of the United States. He was Governor of Massachusetts from 1810 to 1812. In the Federal Convention when he was about 43 years old he took an active part in the debates; but joined with George Mason and Edmund Randolph of Virginia in refusing to sign the Constitution. He was not a member of the Massachusetts Convention but his views were influential in leading to the first ten Amendments suggested by the Massachusetts Convention and submitted by the first Congress.

Rufus King of Newburyport was born in Scarborough, Maine, in 1755 and died at Jamaica, Long Island, in 1827. He was 33 years old at the time of the Convention and took an active part in the debates and also in those of the Massachusetts Convention. He was influential in both bodies. After the ratification of the Constitution he moved to New York and was elected United States Senator from that State. He also served later as minister to London and declined the position of Secretary of State.

Caleb Strong was born in Northampton in 1745 and died in 1819. He stands out as one of the quiet, strong men of "judgment" in the history of Massachusetts. He was about 42 years old at the time of the Convention in Philadelphia. He did not sign the Constitution because he was absent on leave on the day it was signed but he was a strong supporter of it and an influential member of the Massachusetts Convention. He became one of the first Senators of the United States from Massachusetts. In 1800 he was elected Governor and was re-elected annually until 1807 and again from 1812 to 1816, serving ten terms.

(Photo by Purdy)

WALTER PERLEY HALL.

JUSTICE SUPERIOR COURT, 1911–1922, CHIEF JUSTICE, 1922–SEPTEMBER, 1937.*

An able and constructive administrator, who for fifteen years has rendered public service of a high order as the head of a great trial court of thirty-two judges during a difficult period of change in the history of the court.

* Chief Justice Hall resigned on September 13th, 1937.

THE ACTION OF THE EXECUTIVE COMMITTEE OF THE MASSACHUSETTS BAR ASSOCIATION IN REGARD TO JUDICIAL APPOINTMENTS.

June 28th, 1937.

His Excellency the Governor,
State House,
Boston, Massachusetts.

Your Excellency:

At the last meeting of the Executive Committee of the Massachusetts Bar Association a few days ago, attention was called to the recent judicial retirement act and the probability that a number of vacancies on different courts would result from it.

The Executive Committee of the Association consists of the presidents locally chosen of fourteen bar associations in different parts of the Commonwealth, eight members chosen at large, and the President, Treasurer and Secretary of the Association. The committee, therefore, has a majority of locally chosen officers of all the larger bar associations in different parts of the state or of local delegates appointed by them.

In view of the serious importance of the selection of judges to fill these vacancies on the various courts and the difficulties of making such selections, the committee, reflecting, we believe, the general sentiment of the bar, welcomed the assurances in the published statements of Your Excellency that judicial appointments would be made which would deserve the respect of the bar.

The Executive Committee has no special candidates to suggest for any particular court, but is strongly of the opinion that under present conditions when the courts and the administration of justice generally are subject to much criticism, whether fair or unfair, accompanied by frequent comments in recent years in regard to the political character of appointments, it is of the greatest importance that the courts today should be strengthened in the selection of judges, as it is becoming more and more difficult to administer justice in a way to command both confidence and respect in the midst of the rapidly changing complications of modern life.

It was formerly the practice of the Committee on Judicial Appointments of the Association to offer its assistance to former governors if desired. The Committee on Judicial Appointments was abolished a few years ago and its functions, when occasion arises, are to be performed by the Executive Committee, which is broadly representative of the state at large as already explained. Accordingly, we were requested by the committee to express to Your Excellency its view of the current need of strengthening the courts and to offer whatever assistance the committee may be able to furnish in connection with the problem of selection, particularly in regard to the courts of state wide jurisdiction, in case you wish such assistance.

Yours respectfully,

Henry R. Mayo, *President.*
Frank W. Grinnell, *Secretary.*

A METHOD OF SHORTENING RECORDS ON APPEAL—A SUGGESTION TO FEDERAL AND STATE COURTS.

The excessive cost to litigants of printing records on appeal has been discussed for years. Aside from the question whether some form of typewritten record should be used, one method of reducing the cost and producing a less bulky record would be the elimination of unnecessary padding by abbreviated reference to perfunctory documents instead of printing them in full. We have received an ingenious suggestion for accomplishing this object from R. W. Hale, Esq., of the Boston bar, which we respectfully submit for the consideration of all the federal and state courts having rule-making powers. The suggestion is to apply the method of abbreviation used in Massachusetts in 1912 to shorten the forms of deeds.

Mr. Hale illustrates his suggestion by a record in the Circuit Court of Appeals for the second circuit, in the case of *Anglo-Continental Trenhand, A. G.* v. *St. Louis Southwestern Ry. Co.*

The record, as printed, covers 86 pages. Mr. Hale suggests that wherever a merely formal document is printed at length a brief descriptive title be substituted. Page 10 is entirely devoted to the oath of the attorney for the complainant. The words "complaint verified January 14, 1935," would be sufficient. Page 12 could be reduced to, "Due notice of filing removal petition and bond". Pages 16–17, "Petition verified" is enough. Pages 18–22 (5 pages) could be reduced to "Bond on removal $10,000. Fidelity & Deposit Co. as surety". On page 31, "Answer verified March 26, 1935" and instead of pages 73–74, "Petition and allowance of appeal, bond $10,000, supersedeas," would be enough. Pages 78–83 (6 pages) could be reduced to, "Bond on appeal $10,000". Pages 84 and 86 could also be shortened. The title of the court, the name of the county, etc., need not be printed over every pleading or other paper. Once is enough.

By this process more than 20 pages (almost 25%) of the 86 pages of printing could be eliminated. Further study of records would doubtless suggest other possibilities of abbreviating the absurdities of the present practice in most courts of appeal. In a recent state record several pages of print were devoted to the letterheads of all counsel who entered appearances. It was ridiculous.

F. W. G.

THE CONTINUATION OF THE STORY OF THE SUPREME COURT BILL FROM JUNE TO SEPTEMBER.

In the April-June number we reproduced the history of the Court bill from February to June in cartoons and reprinted the Report of the Senate Judiciary Committee against the bill. The continuation appears in the following:

(Extracts from article by Sylvester C. Smith, Jr., of New Jersey, in "American Bar Association Journal" for August, 1937, p. 575).

A rising tide of public opinion forced the abandonment and virtual withdrawal of the so-called "compromise" measure, the Logan-Hatch-Ashurst bill (S. 1392), at a time when the votes seemed to be still in hand to pass it through the Senate. The proposal to re-make the Supreme Court of the United States, and the proposal to add judges to the other Federal Courts on the basis of age rather than demonstrated need, have been decisively abandoned, along with the creation of the office of proctor and the proposed centralized assignment of Circuit and District Judges without the consent of the Senior Circuit Judge as now required. . . .

The Ashurst-Maverick bill of last February was laid aside because the volume of protests was too large and too significant to be ignored. The sponsors of the Logan-Hatch-Ashurst bill were confident that no similar volume of opposition would or could be manifested, in July and August, as to a measure offered as "compromise". When it became clear that such an assumption was utterly mistaken, and that the public opposition to the bill would exceed in volume and vehemence the protests received last February and March, wise counsels prevailed and the bill was recommitted.

. . .

Circumstances gave the conspicuous posts in the fight to members of the Senate; but the Nation should not overlook the fact that, on the House side, there were able and patriotic lawyers who waged a less conspicuous, but hardly less important, battle against the Court proposals, and thereby did much to prevent the bill from gaining momentum by first passing the House. At pivotal posts in the House were Chairman Sumners of the Judiciary Committee and Chairman O'Connor of the Rules Committee; and more than a score of others helped when and where the need was great. *In the opinion of many, Chairman Sumners' stirring speech in the House dealt the ill-fated "compromise" its death-blow.**

* Mr. Sumners' speech in the House on July 13th appears in *The Congressional Record*, pp. 9259–9265.

"This Is Something You'll Want to Write Down . . ."

By a Staff Artist

(By the Courtesy of the Christian Science Monitor of July 13, 1937.)

Mr. Farley Delivers the Groceries

(From New York Herald-Tribune of July 26, 1937, by permission.)

Mention should also be made of the group of seven or eight Senators, headed by Andrews of Florida, who had been active in favor of dealing with the Court issue by a constitutional amendment. When this group informed Vice-President Garner that they would vote to recommit the pending bill, the outcome of the fight became for the first time clear.

THE AGREEMENT IN THE JUDICIARY COMMITTEE.

On Thursday, July 22nd, the Senate Judiciary Committee met, with Vice-President Garner, Majority Leader Barkley, and Senator Wheeler. Agreement was reached to recommit the bill, on the basis of the following points, reduced to writing by Senator O'Mahoney:

(1) No change in the Supreme Court;

(2) No proctor for the Supreme Court;

(3) No roving judges for the lower Courts;

(4) Direct appeal to the Supreme Court on constitutional questions, and amendment of three-judge statute;

(5) Intervention of the Attorney-General to be permitted in cases involving constitutionality of statutes;

(6) Assignment of judges by senior circuit judges;

(7) New judges in lower Courts to be appointed on basis of need—not age.

In the Senate that afternoon, the following took place, according to the official transcript:

"LOGAN: Mr. President, I rise to ask unanimous consent to make a motion to recommit to the Committee on the Judiciary Senate bill 1392, to reorganize the judicial branch of the government, with all amendments thereto. I might say by way of explanation that, after a very full and free hearing this morning, the Committee on Judiciary directed me to make this request with the understanding that it would be instructed to report a bill for the reform of the judiciary within ten days if the motion should prevail. I ask unanimous consent that I may be authorized to make the motion at this time.

(Here the Vice-President repeated the request and asked if there was objection to the making of the motion. There was none.)

"JOHNSON, of California: Mr. President, I desire to know what the judicial reform refers to. Does it refer to the Supreme Court or to the inferior courts?

"LOGAN: I might say to the Senator from California that the Committee on the Judiciary this morning had an understanding

that we did not think it was proper to embrace in the motion what it should refer to. The senior Senator from Wyoming, Mr. O'Mahoney, wrote out what we had before us in the Committee on the Judiciary. It was a statement of what had been said, I believe, by the leader and some others, and that did not refer to the Supreme Court. That was not to be considered at all, I might say.

"JOHNSON: The Supreme Court is out of the way?

"LOGAN: The Supreme Court is out of the way.

"JOHNSON: Glory be to God. (Applause.)

"GARNER: Is there objection to the request of the Senator from Kentucky that he may make a motion to recommit the pending business to the Committee on the Judiciary with instructions to return the bill in ten days? The chair hears none.

"LOGAN: Pursuant to the instructions of the Committee on the Judiciary, as it imposed the duty on me this morning, I move that Senate bill 1392, to reorganize the judicial branch of the government, with all amendments thereto, be recommitted to the Committee on the Judiciary with instructions to that committee to report a bill for the reform of the judiciary within ten days from this date. Mr. President, some days ago, I prepared a speech to deliver on the bill itself in an effort to make my position clear. I have never had an opportunity. I should like to ask unanimous consent that that speech be printed in the record as a part of my remarks.

(Permission was given Mr. Logan.)

"AUSTIN: Reserving the right to object, I wish to ask the Senator from Kentucky whether the agreement should not be stated somewhat differently from the way it has been stated, namely, that the report hereafter to be made, which is contained by reference in his statement, is not to report on a bill to reform the judiciary, but on a bill for reform of judicial procedure.

"LOGAN: I wrote down the suggestions this morning and submitted it to the junior Senator from Nebraska, Mr. Burke, to know whether that was the proper form, and the writing which I submitted to him was that Senate bill 1392, with all amendments, should be re-referred to the judiciary committee with instructions to report a bill relating to judicial reform.

"AUSTIN: Exactly.

"LOGAN: Within ten days. That is the exact language that was agreed upon, and that is the motion which I undertook to make."

Senator McNary then asked for the ayes and nays, and the roll call was taken.

THE ROLL CALL ON THE MOTION TO RECOMMIT THE BILL.

Even with the Administration leaders moving to recommit their bill, the motion prevailed by a vote of only 70 to 20, as follows:

FOR RECOMMITTAL—70

Democrats—53

Adams (Colo.)	Maloney (Conn.)	Murray (Mont.)
Andrews (Fla.)	McAdoo (Calif.)	O'Mahoney (Wyo.)
Ashurst (Ariz.)	McCarran (Nev.)	Overton (La.)
Bailey (N. C.)	McGill (Kan.)	Pepper (Fla.)
Barkley (Ky.)	Minton (Ind.)	Pope (Idaho)
Brown (Mich.)	Moore (N. J.)	Radcliffe (Md.)
Brown (N. H.)	Copeland (N. Y.)	Reynolds (N. C.)
Bulow (S. D.)	Dieterich (Ill.)	Russell (Ga.)
Burke (Neb.)	Donahey (Ohio)	Sheppard (Texas)
Byrd (Va.)	Duffy (Wisc.)	Smith (S. C.)
Byrnes (S. C.)	George (Ga.)	Thomas (Okla.)
Clark (Mo.)	Gerry (R. I.)	Thomas (Utah)
Connally (Texas)	Gillette (Iowa)	Tydings (Md.)
King (Utah)	Glass (Va.)	Van Nuys (Ind.)
Lee (Okla.)	Harrison (Miss.)	Wagner (N. Y.)
Lewis (Ill.)	Herring (Iowa)	Walsh (Mass.)
Logan (Ky.)	Holt (W. Va.)	Wheeler (Mont.)
Lonergan (Conn.)	Johnson (Colo.)	

Republicans—16

Austin (Vt.)	Gibson (Vt.)	Nye (N. D.)
Borah (Idaho)	Hale (Me.)	Steiwer (Ore.)
Bridges (N. H.)	Johnson (Calif.)	Townsend (Del.)
Capper (Kan.)	Lodge (Mass.)	Vandenberg (Mich.)
Davis (Pa.)	McNary (Ore.)	White (Me.)
Frazier (N. D.)		

Farmer-Laborite—1

Shipstead (Minn.)

AGAINST RECOMMITTAL—20

Democrats—18

Bilbo (Miss.)	Ellender (La.)	McKellar (Tenn.)
Black (Ala.)	Green (R. I.)	Neeley (W. Va.)
Bone (Wash.)	Guffey (Pa.)	Schwartz (Wyo.)
Bulkley (Ohio)	Hatch (N. M.)	Schwellenbach (Wash.)
Caraway (Ark.)	Hitchcock (S. D.)	Smathers (N. J.)
Chavez (N. M.)	Hughes (Del.)	Truman (Mo.)

Progressive—1

LaFollette (Wis.)

Farmer-Laborite—1

Lundeen (Minn.)

PAIRED—2

Bankhead, for, and Norris, against

Almost certainly it would appear that the "irreconcilable" twenty votes represented those who sought insistently a re-making of the Court, regardless of effects upon party solidarity or public opinion. By no means all of the seventy votes to recommit were by Senators who had opposed the bill. Among those who voted for Senator Logan's motion to recommit, it is not difficult to identify at least 28 more who would almost certainly have voted for the bill, if the yeas and nays had been called on final passage.

This shows how close was the issue and how fortunate was the outcome dictated by public opinion. Only forty-two Senators were committed against the bill. Forty were publicly committed for it. Fourteen were publicly uncommitted, but more than half of them would almost certainly have voted for the bill, on final roll call. Not a few of the forty committed to the bill were relieved and sincerely glad when eight uncommitted Senators decided and announced that they would vote to recommit the bill.

The Hatch-Burke Resolution for Further Study of the Subject.

On July 28th, Senators Hatch and Burke introduced a resolution (S. Res. 161) which was referred to the Committee on the Judiciary, and is as follows:

> "Resolved, That a special committee of five Senators who are members of the Committee on the Judiciary, to be appointed by the President of the Senate, is authorized and directed to make a full and complete investigation and study of all matters relating to the reorganization of the courts of the United States, the appointment of additional judges for any of such courts, and the reform of judicial procedure, with respect to which any bills or resolutions (including resolutions proposing amendments to the Constitution of the United States) have heretofore been introduced in the Senate or may hereafter be introduced therein during the Seventy-fifth Congress, and to report to the Senate from time to time its recommendations with respect to such matters. The committee so appointed is further authorized and directed to make a special report to the Senate and to the Committee on the Judiciary with respect to any such pending bill or resolution, if such report is requested by the Committee on the Judiciary. . . ."

From my knowledge of the purposes of the sponsors of this resolution, it seems to me to be likely that the creation of such a Committee will lead to constructive proposals worthy of consideration on their merits.

ARE PROPOSALS TO RE-MAKE THE SUPREME COURT "DEAD"?

The now historic report by the majority of the Senate Committee on the Judiciary said, as to the "Court packing" proposal:

> "It is a measure which should be so emphatically rejected that its parallel will never again be presented to the free representatives of the free people of America."

They demanded that a precedent be set, through the action taken on the pending bill, which would be warning against any renewal of the plan in any similar form.

The re-committing of the bill was a decisive rejection. The elimination of the proposals affecting the Supreme Court and the other courts is a fine precedent for the future. The issue created divisions so sharp and so deep as to be dangerous; and patriotic men in the Congress were justly disturbed by the far-reaching consequences of such divisions. Irrespective of the passage or defeat of the bill, such schisms threatened the ability of representative government to function under the guidance of public opinion. This realization was, I believe, the largest single factor in bringing about the abandonment of the court bill. Recollection of it will remain as the most potent single factor against its renewal. It would be too much, however, to expect that efforts will never again be made to capture control of the court. Eternal vigilance will best be maintained, if the courts are to be kept secure as citadels of justice and liberty.

LINTHICUM FOUNDATION PRIZE 1939.

THE FACULTY OF LAW OF NORTHWESTERN UNIVERSITY
ADMINISTERING THE INCOME OF
The Charles Clarence Linthicum Foundation
ANNOUNCES THAT

The sum of one thousand dollars and a bronze medal, as a first prize, and not more than five sums of one hundred dollars each, as second prizes with honorable mention, will be awarded to the authors of the best monographs submitted by March 1, 1939, on the following subject:

> Corporations Doing Business in a Foreign Country: Existing Legal and Administrative Restrictions, and Their Policy.

The rules may be obtained from the University.

"SENATORIAL COURTESY."

The current, rather emotional, discussion by senators and newspaper editors as to the possibilities of impeaching Senator Black because of the persistent assumption that he has already become a member of the court by taking the oath in August, led us to secure from Washington a copy of the *Congressional Record* of August 17th, containing the debate in the Senate on the question of confirming Senator Black.

In the light of this debate (covering almost 35 pages), which began with a vigorous speech by Senator Copeland specifically charging that Senator Black was closely connected with the Ku Klux Klan, it is curious that what is called "senatorial courtesy" led sixty-three senators to make the mistake of voting against Senator Bridges' proposal for an investigation of those charges by the Judiciary Committee. The action of these senators seems to furnish evidence in support of the wise remark, attributed to the late President Coolidge,

> "So far as the wisdom of the Supreme Court is concerned, it is not necessary to prove that the court never makes mistakes; but it is necessary to prove that those who will exercise these powers will make fewer mistakes."

It is also strange that the senators did not require a full consideration by the Judiciary Committee of the constitutional question of the eligibility of Senator Black, which is discussed later in this number (see p. 20). Senator Austin of Vermont explained this matter to the senators. (See *Congressional Record* of August 17, pp. 11643–11649.)

F. W. G.

THE AMERICAN BAR ASSOCIATION—PAST AND FUTURE.

(Dunbar F. Carpenter in the Bar Bulletin for September, 1937.)

The program for the sixtieth annual meeting of the American Bar Association, to be held at Kansas City, Missouri, September 27—October 1, proclaims the distance the Association has travelled since three score and five lawyers met at Saratoga Springs, New York, in August, 1878, to organize the first national association of the bar.

The tentative program for the sixtieth annual meeting covers twelve and one-half pages of the *American Bar Association Journal* for August. The volume containing the reports of the committees to be presented at the annual meeting, received while this article was being written, covers 385 pages, and includes the reports of 14 standing and of 23 special committees. Both the program and the committee reports are an accurate reflection of the many subjects of importance claiming the attention of the Association, and of the nation's bar.

While the social features of the annual gathering should not be minimized, the inescapable fact is that the business side of these meetings is yearly becoming of greater importance. Since the Association was reconstituted last year at Boston, the meetings of the House of Delegates and of the Assembly have a new importance.

The value of a national association of lawyers has been amply demonstrated this very year by the American Bar Association in its successful opposition to the plan to pack the Supreme Court. This, to be sure, was a spectacular event, but every year the Association is carrying on other activities of the greatest value to the bar—such as the campaign against unlawful practice of the law, through which it has inspired action by bar associations seemingly in every state.

The measure of the Association's growth is illustrated by the change in the type of its presidents. In its early days, the presidency was bestowed upon that member who had reached the highest eminence in the profession. It was a graceful recognition of accomplishment—and little in the way of activity was expected from the recipient. In recent years, the duties of the presidency have so increased that only men who are willing and able to give

practically all their time to the office are chosen. From an office largely honorary, it has become an office requiring incessant work and almost continuous travelling to address gatherings of lawyers from the Atlantic to the Pacific.

In spite of the increasing need of a national association of lawyers as our civilization grows yearly more and more complex, the lawyer is apparently a reluctant joiner. Doubtless for historical reasons, the bar tends to be centrifugal rather than centripetal; whereas, oddly enough, the tendency in the medical profession is the reverse. Out of approximately 175,000 lawyers in the land, only 29,008 were members of the American Bar Association in 1936. In contrast, 101,801 physicians and surgeons out of 165,163 belonged on June 1, 1936, to the American Medical Association. Of the medical profession, 60 per cent belong to their national association; of the lawyers only 15 per cent think it worth while to contribute eight dollars a year to their national organization.

The foregoing is simply a statement of fact. As to why a majority of the medical profession belong to the American Medical Association while only one lawyer out of every seven belongs to the American Bar Association, the BULLETIN is not informed.

However, it was not always thus with the medical profession. At the beginning of this century, the physicians of the nation were decidedly not national association-conscious. Although there were approximately 120,000 physicians and surgeons in the United States in 1902, only 12,553 belonged to the American Medical Association, and membership continued low until the Association was reorganized in 1913. The increase from 12,553 in 1902 to 101,801 in June, 1936, can hardly have been fortuitous. The probability is that the American Medical Association, subsequent to, and doubtless because of, its reorganization in 1913, made itself so vital to the medical profession that practitioners of the medical art find that they can not afford not to belong.

It may well be that the American Bar Association will come to occupy a comparable position in the legal profession. It has made an auspicious start. It will undoubtedly become ever clearer to the profession that a vigorous national bar association, responsive to the desires and needs of the profession is not a luxury but a necessity; and as this fact seeps in, the membership of the Association will in time, it is to be supposed, correspond to that of our brethren in medicine.

Small as the total membership of the Association may be, in comparison with that of the American Medical Association, there is no cause for alarm. In 1888, less than forty years ago, the membership of the American Bar Association, then ten years old, was only seven hundred and fifty, and in 1900 it was less than two thousand. It is today approximately thirty thousand. Conditions which face the bar—one of which is over-crowding as convincingly developed by the survey of the New York County Lawyers Association—make inevitable the continued growth of the national Association.

TAX TITLES UNDER STATUTE 1937, CHAPTER 209 AND THE LESSORS COVENANT OF QUIET ENJOYMENT.

EDITOR MASSACHUSETTS LAW QUARTERLY:

A lessor's covenant of quiet enjoyment runs with the land. By Statutes of 1937, Chapter 209, a sale of the lessor's interest for taxes gives a title subordinate to all covenants running with the land. *Ergo,* it gives title subject to such a covenant. *Ergo,* if land be leased, no matter how small the rent, all that the tax gatherer can realize upon it is the right to receive the peppercorn or other rental. If our court remembers the dictum of Mr. Justice Ebenezer Rockwood Hoar, when he had his ebenezer up,—when his successors shall have "expounded" this statute, the law, most probably, will not mean as much as that. But having stated the statute and this line of thought about it, I do suggest that a committee upon bills in the third reading might have done better.

Selah!

R. W. H.

CAN SENATOR BLACK BECOME A MEMBER OF THE SUPREME COURT UNDER THE CONSTITUTION?

(Reprinted from the Boston Herald of September 15, the Boston Transcript and the Springfield Union of September 16, and the New York Herald-Tribune of September 18th, 1937.)

To the Editor:

Aside from the current discussion of Senator Black's alleged membership in the Klan, about which I know nothing, there is a question of constitutional law to be decided by the court before Mr. Black can take his seat. The matter has been referred to in the press and apparently two documents have been filed in court by different persons raising legal objections to the appointment.

There are two aspects to this legal problem and, so far as I have observed, only one has been stated in the press.

The first relates to the legality of the appointment, the second, to the method of raising the question for decision.

First, according to the newspapers, the attorney-general advised the President that there was no legal objection to the appointment and a majority of the Senate, many of whom had urged the appointment of the late Senator Robinson, voted to confirm. But the Constitution provides that

> "No senator or representative shall during the time for which he was elected be appointed to any civil office under the authority of the United States which shall have been created, or the emoluments whereof shall have been increased during such time."

In an article by Andrew F. Burke, Esq., of the San Francisco bar, reprinted in the *Congressional Record* of August 19, it is demonstrated that the retirement act of March 1, 1937, passed while Mr. Black was a member of the Senate, "created" a new office by increasing the Supreme Court from nine members to ten members, nine of whom are active and one of whom has retired from active service; and it is also pointed out that the act "increased the emoluments" of every position on the court by providing the privilege of voluntary retirement from active service on full pay, without resigning, thus enabling a judge after a certain age to receive full salary on retirement without the danger of reduction, to which Mr. Justice Holmes was subjected after he resigned.

The debates in the constitutional convention on September 3, 1787, show that the delegates had a very clear, and prophetically practical, vision of the political log-rolling possibilities between the

executive and the legislative branches which they endeavored to restrict for very modern reasons by adopting the words already quoted. Those words were suggested by Roger Sherman of Connecticut to avoid giving "too much influence to the executive".

Second, how can the question arise before the court?

The question as to who legally constitute the Supreme Court of the United States is not a "case" to which there are any "parties" within the meaning of the constitutional clauses about original and appellate jurisdiction. The question is obviously an administrative question which it seems the duty of the court to decide, of its own motion, when Senator Black appears to take his oath and take his seat.

The court has no right to allow a man to sit on that court who is not legally entitled to do so under the Constitution. If you or I should appear in the courtroom and ask the court to administer the oath and allow us to sit as members of the court, no "case" would be presented in the usual sense of the word, but merely a practical situation to be dealt with by the court.

If President Roosevelt had changed his mind after the Senate confirmed the Black appointment and had refused to sign his commission, and if Senator Black should have appeared to take his seat without any commission, the same sort of situation would have arisen for the court to deal with as a matter of administration under the Constitution. The fact that Senator Black holds a commission signed by the President after confirmation by the Senate does not give him a right to sit upon the court if the Constitution says that the action of the President in nominating him, of the majority of the Senate in confirming him and of the President in signing the commission, is illegal.

The American people have a right to have their Supreme Court appointed in accordance with the Constitution. The court has judicial notice of the facts; the burden rests on Senator Black to establish before the court his legal right to sit upon the court. The action of the President and the majority of the Senate cannot make that legal which is illegal.

FRANK W. GRINNELL.

NOTE.

As to the meaning of the constitutional provision and its application to Senator Black, we reprint the interesting discussion from the *San Francisco Record* of Andrew F. Burke, Esq., which was

also reprinted in the *Congressional Record* of August 19th. The question was debated in the Senate by Senator Austin and others (see *Congressional Record* for August 17, 1937, vol. 81, No. 160, pp. 11,622–11,657). The suggestion was made by Senator McGill and others that a new "circuit" judgeship had been created to which Mr. Justice Van Devanter had "retired". The answer to that seems to be that Congress has no authority to appoint to a new office but has authority to enlarge the "rights and privileges" of an existing office to include retirement to inactive or occasional *voluntary* service in the lower courts in which Supreme Court judges have always been authorized to sit as circuit judges. The legal arguments in the Senate in support of the appointment seem to us to violate the English language used in the Constitution, when applied to the facts.

The fact that the question involves the legality of a commission issued by the President does not alter the question. Ten months after the appointment of Judge Story by President Madison, a case came before Judge Story (sitting as a circuit judge in Salem) in 1812, it was contended that a proclamation of President Madison reviving an embargo law was illegal. Judge Story was thus called upon to decide upon the legality of the action of a President who had just appointed him to office, and upon its legality as bearing upon a class of cases in which the President and his administration were vitally desirous of obtaining convictions.

In spite of his youth and his personal and political predilections, Story without hesitation, held the action of the President to have been illegal.

"I take it to be an incontestable principle" said the judge, "that the President has no common law prerogative. . . to revive any act whose operation has expired. His authority must be derived from some positive law. . . . For the executive department of the government, this court entertains the most entire respect; and amidst the multiplicity of cares in that department it may, without any violation of decorum, be presumed, that sometimes there may be an inaccurate construction of a law. It is our duty to expound the laws as we find them in the records of state and we cannot, when called upon by the citizens of the country, refuse our opinion, however it differs from that of very high authorities. I do not perceive any reasonable ground to imply an authority in the President to revive this *Act*, and I must, therefore, with whatever

reluctance, pronounce it to have been, as to this purpose invalid."

(See *The Schooner Orono,* 1 Callison 137, in 1812, referred to by Hon. Charles Warren in MASSACHUSETTS LAW QUARTERLY for December, 1924, p. 225.)

No question of a "*de facto*" judge seems to exist as a result of the taking of the oath in August, for the oath cannot add to the legality of the commission, and the burden of establishing his constitutional credentials before the court appears to rest on his shoulders as it rests on an applicant for admission to the bar or a delegated representative of other bodies. The extent to which the *de facto* doctrine in notorious situations can override *mandatory* constitutional provisions as to the highest judicial tribunal in the country is a question which seems open to discussion. (See discussion of the situation recently threatened in Massachusetts under the title, "The Non-Existent Powers of De Facto Officers" and the draft of a writ of prohibition to meet it in MASSACHUSETTS LAW QUARTERLY for January, 1937, pp. ; and *cf.* Opinions of Rugg, C. J. in *Attorney General* v. *Methuen,* 236 Mass. at pp. 575–576 and *Com.* v. *Distasio,* Mass. Adv. Sheets of 1937, p. 791, decided May 28, 1937.)

As to the procedure, a writ of prohibition to prevent the attempted exercise of jurisdiction not possessed may be applied for by any person in the public interest without the intervention of the Attorney-General (See *Smith* v. *Whitney,* 116 U. S. 167); but in an unprecedented administrative situation like the present, a motion or other direct proceeding would seem sufficient if the court does not raise the question of its own motion.

The article by Andrew F. Burke, Esq., of San Francisco, referred to on page 20, is reprinted at the end of this number.

F. W. G.

MR. JUSTICE VAN DEVANTER AND THE COMMON LAW "WRIT OF EASE".

The question was raised in Congress, and by lawyers in the press, whether the retirement act, under which Mr. Justice Van Devanter retired, created a legal vacancy which could be filled by a new appointment.

The act (Ch. 21 approved March 1, 1937) provides that:

> "justices of the Supreme Court are *hereby granted the same rights and privileges with regard to retiring,* instead of resigning, granted to" other federal judges "by section 260 of the Judicial Code (U. S. C. title 28, sec. 375) and the President shall be authorized to appoint a successor to any such justice of the Supreme Court so retiring from regular active service on the bench, but such justice of the Supreme Court so retired may nevertheless be called upon by the Chief Justice and be by him authorized to perform such judicial duties in any judicial circuit, including those of a circuit justice in such circuit, *as such retired justice may be willing to undertake.*"

The "*rights and privileges*" thus referred to are that a judge who has "held a commission or commissions as judge of any [United States] court or courts at least ten years continuously, and having attained the age of seventy years . . . instead of resigning . . . *may* retire, upon the salary of which he is then in receipt, from regular active service on the bench".

We see no reason to doubt the authority of Congress to provide for the appointment of an additional judge for active service upon the voluntary retirement from active service of a judge under the act. There is nothing new about the idea. It is simply doing, by a general statute, what the Crown used to do in specific cases by a common law writ known as a "writ of ease". In the interesting "Life of Judge Jeffreys," by H. B. Irving (p. 321), it appears that James II appointed Christopher Milton, the younger brother of the poet, as a Baron of the Exchequer at the age of seventy-one and that in two years he "was given a writ of ease in consideration of his age. A quiet easy man, he survived some five years in retirement in the country". The same fact appears in Foss' "Judges of England," Vol. VII, p. 257 (single volume edition, p. 446).

Most of us never heard of a "writ of ease"; but the librarian of the Social Law Library has produced "Robinson's Entries"—a folio volume of precedents printed in 1684 and collected by direction of "Sir Thomas Robinson, Baronet; late chief prothonotary of the Court of Common Pleas, from the manuscripts in his office" in which, on page 284, there is a form, in Latin, of a writ of ease granted to Mr. Justice Kingsmill (who was a judge in the reign of Elizabeth and of James I); about eighty years before the Milton case. As the quaint document is of historical, as well as of current, interest in connection with the recent act of Congress, we applied to Dean Pound for a translation, and print the result together with a reproduction of the page from "Robinson's Entries".

F. W. G.

As to the translation, Dean Pound writes:

> "It is a fearfully prolix thing, and being in one long sentence without punctuation, very hard to put in anything like a good English dress. Those seventeenth-century writs (for this writ is not in the sixteenth century collections) seem to have been made up by putting together a lot of tags from older writs, and are badly disjointed. Also the Latin is at times a bit corrupt."

(See pp. 26–27.)

Breif de Ease.

Breif de Ease conces' uni Justic' de Banco.

DOminus Rex mand Dilecto & fideli suo Georgio Kingsmill militi
uni Justiciar ipsius Domini Regis de Banco Literas suas Paten
in hec verba Jacobus dei gracia Anglie Scocie Francie & Hibernie
Rex fidei Defensor &c. Thesaurar Cancellar Camerar & Baronibus
Scaccarii nostri necnon dilecto & fideli nostro Georgio Kingsmill mil
uni Justic nostroz de Banco salutem Sciatis qd nos consideran debilitatem corpo-
ris vestri pfat Georgii Kingsmill senio & etate confract necnon laboris pluritat &
tedium que in officio unius Justic nostroz de Banco extend subire soletis vobis pfat
Geo. Kingsmill vacandi libe de cetis curis & negociis vestris ppriis & optate rene-
aconis commodis absq eo qd de dicto officio vel al contra voluntate & bene plitum
vestra de ceto sitis oneratl licenciam p nobis & heredib nostris dam & concedimus
special ac vos de diuturna vestra attendencia & servicio in & circa execucone ejusde
officii libe absolvimus Ita tamen qd in dicto officio unius Justiciar nostroz de
Banco movemini ac locum & dignitatem vestra pdict plene retinuetis necnon cum
aliis sociis vestris Justic nostris de Banco adlibitum & beneplacitum vestra & ali-
quib ad officium pdict spectan sive ptin libere & plene osemini & vos intromitteris
necnon nomen stilum dignitate & officium unius Justic nostrorum de Banco de ceto
habeatis & retineat Et ulterius de uberiori gracia nostra speciali ac ex certa sci-
encia & mero motu nostris ac p laudabili servicio nobis & pcharissime sorori nostre
Dne Eliz. nup Regine Anglie necnon univsle reipublice antehac in administracon
justicie pstit p nobis heredibus & successorib nris damus & concedimus vobis pfat
Georg Kingsmill unam annuitatem sive annualem summam centum libraz lega-
lis monete Anglie p Annum habend & capiend pdcam annuitatem centum libraz
leglis monet Anglie p Annum vobis pfat Georgio Kingsmill & Assign vestris p
& durante vita naturali vestri pfat Georgii Kingsmill solvend ad recept scaccarii
nostri Hered & Successor nostroz p manus Thesaur & Camar nostroz Hered &
Successor nostroz p tempore existen de Thesaur nostro Hered & Successoz nro-
rum in manibus suis de tempore in tempus fore contingen ad festum natalis Dni
Annunciaconis bte Marie Virginis Nativitatis Sancti Johis Baptiste & Sancti
Michis Archi p equales porcones annuatim solvend durante vita naturali vestri
pfat Geo. Kingsmill quare volumus & p psentes firmit injungend pcipimus tam
Thesaurar Cancellar Camer & Baronibus de Scaccario nostro Hered & Successoz
nostroz quibuscunq quib in hac pte ptinebit p tempore existen qd ipsi & eoz
quilibet sup solam demonstraconem haz literaz patencium vel irrotulament eaz
absq aliquo bri seu Warr a nobis heredib vel successor nostris in hac pte psequend
seu obtinend dictam annuitate centum libraz p annum pfat G. Kingsmill vel As-
signatis suis modo & forma supradcis solvent & delibent seu solvi & delibari facient
& causabunt & hz litere nostre paten irrotulament earde erunt tam dicto Thesaur
Cancellar Camer & Baronibus Scaccarii nostri pdci Heredum & Successoz nrorum
quam omnib & singulis aliis Officiar & Ministris nris Heredum & Successoz nroz
quibuscunq p tempore existen quib in hac pte ptinebit sufficien Warran & exo-
neraco in hac pte eo qd expressa menco de vero valore annuo aut de certitudine p-
missoz sive eoz alicujus aut de aliis donis sive concessionib p nos seu p aliquem p-
genitoz sive pdecessoz nostroz pfat G. K. ante hoc tempus fact in psentib mi-
nime fact existit aut aliquo statuto actu ordinacone pvisione pclam sive restric-
cone in contrarium inde ante hac hit fact edit ordinat seu pvis aut aliqua alia re
causa vel materia quacunq in aliquo non obstante In cujus rei &c.

PAGE 284 FROM ROBINSON'S "BOOK OF SPECIAL ENTRIES"
PRINTED IN LONDON IN 1684.

TRANSLATION OF THE FORM OF A WRIT OF EASE FROM ROBINSON'S ENTRIES PRINTED IN 1684, PAGE 284.

Writ of Ease conceded to one of the Justices of the Bench.

Our Lord the King sends to his beloved and faithful George Kingsmill, Knight, one of the Justices of the Bench of our Lord the King himself his letters patent in these words:

James, by the grace of God, King of England, Scotland, France and Ireland, Defender of the Faith, etc., to the Treasurer, Chancellor, Chamberlain, and Barons of our Exchequer, as well as our beloved and faithful George Kingsmill, Knight, one of our Justices of the Bench, Greeting: Know ye that we considering the bodily debility of you the said George Kingsmill contracted by senile feebleness and age, as well as extent of labor and weariness which in the office of one of our Justices of the Bench you are wont to continue to undergo, we freely grant and concede for us and our heirs to you the said George Kingsmill the liberty of retiring free for certain cares and affairs of your own, without this that by the said office or contrary to your will and good pleasure you be burdened thereby, and specially we freely absolve you from your daily attendance and service in and about the execution of the said office. In such wise, notwithstanding, that what you have begun and your place and dignity you fully hold, likewise with your other companions, our Justices of the Bench, at your will and good pleasure, and be occupied and engaged fully and freely with other things regarding and belonging to the said office and likewise have and retain the style and dignity of one of our Justices of the Bench. And further of our more abundant grace specially and from certain knowledge and our mere motion and for laudable service to us and to our very dear sister the Lady Elizabeth, recently Queen of England, likewise performed for the whole state formerly in the administration of justice, we grant and concede for our heirs and successors to you, the said George Kingsmill, an annuity or annual sum of 100 pounds lawful money of England per annum to have and take the said annuity of 100 pounds lawful money of England per annum to you the said George Kingsmill and your assigns for and during the natural life of you the said George Kingsmill, to be paid to the said George Kingsmill annually in equal portions during the life of you the said George Kingsmill from moneys in their hands from time to time happening to be, on the natal feast of our Lord, the feast of the Annunciation of the Blessed Virgin Mary, the feast of the Nativity of St. John the Baptist, and the feast of St. Michael, the Archangel: Wherefore we will and by these presents firmly enjoin and command both the Treasurer, the Chancellor, the Chamberlain, and the Barons of the Exchequer, and their heirs and successors, and to whomsoever the matter shall pertain in this respect for the time being, that they and any one of them upon the mere showing of these letters patent or the enrolling of them without any other warrant from us or our heirs or successors in this respect to be sought for or obtained, shall pay and deliver the said annuity of 100 pounds to the said George Kingsmill or his assigns in the manner and form above provided or cause it to be paid and delivered and shall cause these our letters patent to be enrolled and the same shall be sufficient warrant and exoneration in this respect, both to the said Treasurer, Chancellor, Chamberlain, and Barons of our Exchequer, and our heirs and successors and all and singular other officers and ministers of ours and of our heirs and successors at any time existing to whom this matter shall pertain, from this that express mention of true annual value or of the certainty of our promises or of any other of our gifts or concessions by us or our progenitors or predecessors before this time made to the said George Kingsmill stand diminished in the present or by any statute, act, ordinance, provision, proclamation or restriction to the contrary heretofore had, made, published, ordained or provided notwithstanding any other thing, cause, or manner whatever in any respect.

In Testimony Whereof, etc.

CHARLES THORNTON DAVIS AND THE LAND COURT.

Judge Davis died at Marblehead on September 4, 1936. He was an Associate Judge of the Land Court from October 14, 1898, until February 5, 1909, when he became judge and continued in that office until his death.

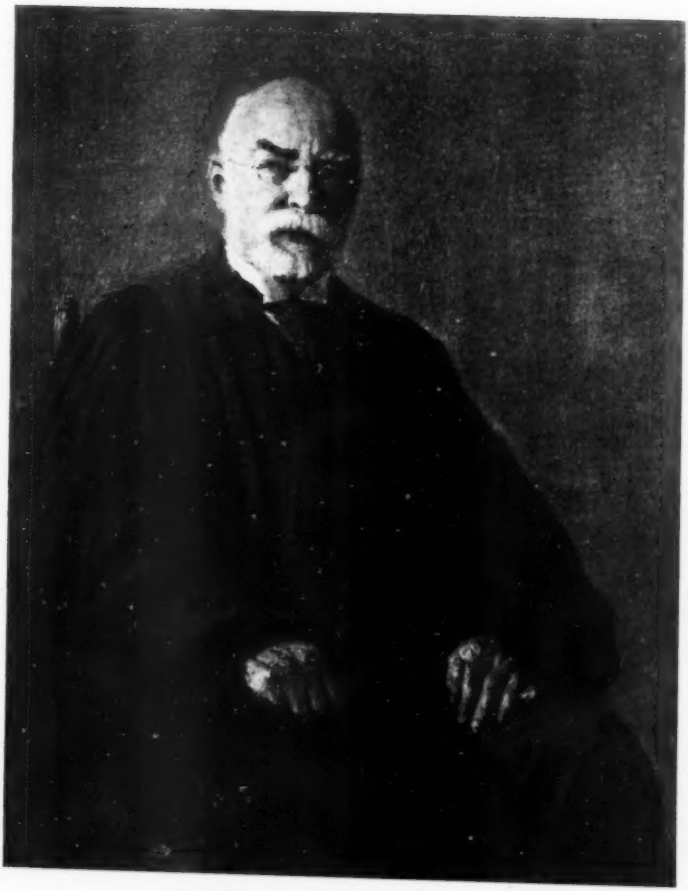
We have no regular memorial section in this periodical as it is primarily devoted to the living law and not to dead men except insofar as their influence is continuing or their story especially pertinent to the understanding and development of the living law. Judge Davis falls peculiarly within this exceptional class for it is seldom that the constructive history of a new court during a period of almost forty years centres about the ability and personality of one man to the extent that the history of the Land Court centred about Judge Davis.

It is common knowledge among the conveyancing bar that the real development of the court, and its gradual establishment and growth in the confidence of the community, were the work of Judge Davis with the able assistance of Judge Smith, the first registrar and later a judge and, for the past twenty-three years, of Judge Corbett. These three men have been "The Land Court"* and, great as have been the services of Judge Corbett and Judge Smith, Judge Davis was the spearhead in the advance of the court in public estimation.

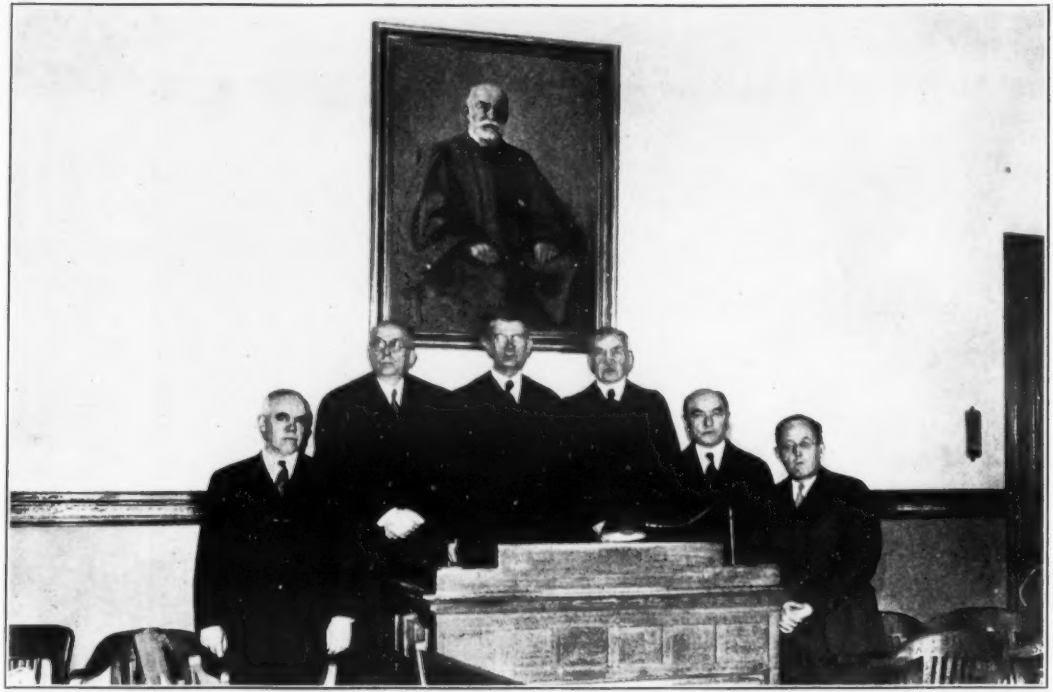
It is because they form a hitherto unwritten chapter in the judicial history of Massachusetts that we print extracts from the Memorial of the Massachusetts Conveyancers' Association, the response of Judge Smith, and the remarks of Judge Davis on his last public appearance with members of the bar.

In addition to his regular judicial work, Judge Davis was frequently called upon for other professional service without compensation, except that of professional interest. He was drafted as chairman of the special commission on the law of "Liens, Mortgages and Tax Titles" in 1915, and the report of this commission, (House Document No. 1600 of 1915) deserves the study of those interested in the law on these subjects. When the Judicial Council was created in 1924, the judge of the Land Court, or an associate judge designated by him, was specified by the act (St. 1924, c. 244) as one of its members and Judge Davis served

* Judge Michael A. Sullivan of Lawrence, who succeeded Judge Davis, was cut off by death, after only a few months of service, from a promising judicial career. Judge Fenton, recently appointed, begins his service with the good wishes of the bar.



CHARLES THORNTON DAVIS.
(From the Portrait by Orlando Rouland.)



THE LAND COURT AND REPRESENTATIVES OF THE BAR AT THE MEMORIAL EXERCISES FOR JUDGE DAVIS.

JUDGE SMITH, JUDGE SULLIVAN, JUDGE CORBETT,
ELIAS FIELD, MOSES S. LOURIE,
ALBERT L. PARTRIDGE.

actively on the council from its creation until his death, with the exception of two years when Judge Corbett took his place. He was also a member of the Massachusetts Historical Society, the Brookline Thursday Club, and other historical or social organizations, as well as the last president of the Papyrus Club founded by John Boyle O'Reilly and others.

He was a constructive force in the Commonwealth and a genial soul. F. W. G.

On March 20, 1937, a special session of the Land Court was held in Boston, with Judge Sullivan, Judge Corbett and Judge Smith on the bench.

Moses S. Lourie, Esquire, addressed the court as follows:

May it please your Honors: It has been entrusted to me by the officers and members of the Massachusetts Conveyancers' Association to present to this court a memorial prepared by the Committee of the Association, which expresses the bar's appreciation of the life, character and high public service of Charles Thornton Davis, late the judge of this court.

EXTRACTS FROM THE MEMORIAL.

Judge Charles Thornton Davis was born in Concord, New Hampshire, on January 12, 1863, the son of Dr. Charles A. and Mary (Thornton) Davis. He looked back upon a distinguished ancestry, being a direct descendant of Ephraim Davis, one of the early settlers of Newbury, Massachusetts, and of Dr. Matthew Thornton, a distinguished patriot and statesman of New Hampshire, one of the signers of the Declaration of Independence and, later, a judge of the Superior Court of New Hampshire. Dr. Davis died in 1863. Later his widow married Judge William Sewall Gardner of Newton, later a justice of the Supreme Court of Massachusetts, by whom Judge Davis was reared in an atmosphere which inclined him to the law as a profession.

Judge Davis graduated from Newton High School in 1879 and entered Harvard College with the class of 1884. Later he studied at the Harvard Law School and in the law office of Col. W. S. B. Hopkins of Worcester and was admitted to the bar on December 24, 1886. In 1888 he formed in Boston with the late James D. Colt the law firm of Davis and Colt. In 1891 he entered the law office of John C. Combs and became conveyancing counsel for the Conveyancers Title Insurance Company. Rapidly, he came to specialize in real estate law and, in 1894, established his own law

office in Worcester. His ability in his chosen field came to be recognized through his distinguished service as conveyancing council for the Metropolitan Water Board and upon the creation of the Land Court in 1898 he was appointed Associate Judge and qualified as such on October 14, 1898. On February 5, 1909, he qualified as Judge of the Court, an office which he held with distinction until the date of his decease, September 4, 1936. From the beginning, the bar had great confidence in Judge Davis and great respect for him, sentiments which grew stronger as the passing years established the Land Court as a useful and honored arm of the judiciary of the Commonwealth; indeed it should be said that knowledge of his ability and upright character was not confined to the bar but became a matter of public appreciation. His temperament and honesty of purpose, supported by the voice of approval, enabled him to conduct the affairs of the court in a democratic manner which has been helpful and pleasing to the bar and to the public in general. . . .

After removing from Worcester, Judge Davis resided in Beverly, Milton, Brookline and lastly in Marblehead. In each of these communities he is remembered as a good citizen, always interested in civic welfare, and everywhere possessing a host of friends. He consolidated the administration of trusts for the Western Diocese of the Episcopal Church in Massachusetts and served for several years as president of the board of trustees. In the church he had served as vestryman and as a junior warden.

Always Judge Davis was interested in the traditions and fortunes of the United States Navy and was intimately acquainted with many of its officers. His father was the founder of the Marine Hospital at Chelsea, Massachusetts. His uncle, James Sheppard Thornton, a brilliant officer of the old Navy, was executive officer of the Kearsarge at the time of her engagement with the Alabama. Judge Davis himself enlisted in the Massachusetts Naval Militia, the fore-runner of the Naval Reserve, and served through the various grades to a commission. He was one of the original members of the Wardroom Club, founded by the late John W. Weeks, and served for many years as an officer and director. He was active in the Massachusetts Commandery of the United States Naval Order, serving as Vice Commander and member of the Council. He was greatly interested in the National Sailors' Home at Duxbury, Massachusetts, and was a trustee of that institution. He was a member of the Sons of the American Revolution. . . . Upon the occasion of

his fiftieth anniversary at Harvard College, he was elected to honorary membership in the Harvard Chapter of Phi Beta Kappa.

His fund of information concerning interesting people of several generations was inexhaustible and always illuminated his speech, whether in public or among his intimates. . . .

After the foregoing was written down, reference to the biography of Dr. Matthew Thornton, as set forth in the *Biography of the Signers to the Declaration of Independence,* published in Philadelphia in 1828, revealed statements descriptive of his characteristics so similar to the impressions of Judge Davis which we retain, that it seems proper to quote these statements. They are as follows:

> "In private life, the social feelings and attachments of Dr. Thornton attracted the general esteem of those by whom he was surrounded; the young and the old were alike participators in the agreeable versatility of his powers, and the inexhaustible stock of information which a long and industrious life had accumulated. His memory was well stored with a large fund of entertaining and instructive anecdotes, which he could apply to any incident, or subject of conversation. Hence his society was universally courted, and few ever left his presence without being both instructed and amused. Nor were his instructions speedily forgotten; for they were invariably interwoven with some anecdote of the character or event which he wished to describe, and illustrative of the lesson which he desired to impart; these pleasant intertextures were so applicable, that the recollection of them could not fail to recall to the memory the circumstances with which they were connected."
>
> "His vigorous mind seemed to seize bodily upon the leading points of the subject which it proposed to investigate, and never to relax its grasp until it had arrived, almost uniformly, to a correct conclusion."

These statements as well might have been written concerning Judge Davis and indicate that he took by inheritance many of the qualities which caused him to be so universally beloved and respected.

Two public utterances following the decease of Judge Davis may well be repeated here as truly descriptive of his personal characteristics. In a resolution passed on September 26, 1936, the Judicial Council, after referring to the valued service given to the Council by Judge Davis, said this:

> "His cheerful and generous nature and his evident fondness for his fellowmen made him a delightful companion and his courtesy and consideration for others and their views gave him deserved influence at the Council table."

A member of the judiciary, writing for the public press, said this:

> "Courteous to counsel, he was especially kind to the juniors, patient, unwearying in his explanations to them of the points involved, yet expeditious in the conduct of the trials at bar."

May it please your Honors: the bar begs to adopt as a part of this memorial these statements quoted from other sources, and as an expression of the respect and affection in which the bar held Judge Charles Thornton Davis, and as a tribute to his memory, on behalf of the bar, I move that this memorial as so completed be embodied in the records of this court.

Albert L. Partridge, Esq., President of the Massachusetts Conveyancers' Association, who succeeded Judge Davis in that position, supported the motion, saying in part:

> "I speak for the members of the Massachusetts Conveyancers' Association and by their direction. Judge Davis honored the Association by serving, for a number of years, as its President. When Samuel T. Harris, long the President of the Association, passed away, there was a general desire that Judge Davis should accept the presidency. Being advised of this desire, he demurred. The reason which he assigned for his demurrer did him credit and well illustrates his character,—it was that he was fearful that there might arise some issue between the court and the bar which, should he accept the presidency, would find him in a position where he might not be able to do full justice to both parties. After the arguments were all in, both on the demurrer and on the merits, the judge consented to accept the office for one year. At the end of the year he expressed doubt as to the advisability of accepting re-election, but after we had all urged him to do so, and had also urged that the possibility of any embarrassment was so remote as not to warrant consideration, he graciously consented.
>
> "I am certain that the opportunity of putting aside his judicial robes and mingling informally with the gentlemen of the bar who practised before him, and of presiding over the moot-courts of our meetings, freely, informally, and with the full assurance that the whole membership enjoyed his presence and was grateful for it, constituted one of the happiest circumstances of his later career. I state this with some assurance, because he told me so. . . . ."

Elias Field, Esq., of the Boston bar also supported the motion and spoke feelingly of Judge Davis.

RESPONSE OF JUDGE CLARENCE C. SMITH.

We are met to pay homage to a departed friend. We are also assembled to record in enduring form our appreciation of the distinguished services of Judge Davis in this court.

Time in retrospect runs swiftly. It seems only a few short years ago that Judge Jones and Judge Davis came to my law office at 68 Pemberton Square (directly opposite the windows of this court room) to confer about opening the new court. On October 14, 1898, the Court of Registration, as it was originally called, opened for business in a suite of rooms on the second floor of the Tremont Building. Quarters were maintained there till February 1, 1901, when a move to larger quarters on the second floor of the Pemberton Building was made. Here the court remained till January 31, 1911, when it moved to its present quarters in the court house. During this long period of thirty-eight years Judge Davis was in active and full time service. His superabundant energy and enthusiasm as a young man did not diminish with the passage of years. He remained a militant figure to the end.

In the performance of his life work it should be noted in the first place that he was admirably fitted by previous experience to head the experiment launched by Chapter 562, Acts of 1898. Again his was a rare opportunity to develop a new judicial way of life in dealing with title to the soil of the Commonwealth itself largely untravelled by prior existing customs and procedure. In biblical phrase his "fullness of time" had arrived, and when that comes to a man like Judge Davis, nothing can keep him from the major task his life seems destined to perform.

I think it may now be assumed the experiment has been a success as actually administered. Speaking summarily, no one today questions the advantages of a registered over an unregistered title to real estate. It was not so at the beginning. Unity is an iridescent dream in this life. All progress is made in a resisting medium. In this case it was the natural conservatism of lawyers and not a few laymen which is so well stated in the dissenting opinion in *Tyler* v. *the Judges*, etc., "When authority and precedent is wanting there is need of great consideration, before anything of novelty shall be established." Judge Davis encountered in full measure this inevitable opposition, but as years passed he overcame it. From an experiment the new court grew to a settled insti-

tution in our judicial system, and from time to time more items of jurisdiction have been added or diverted from other courts. All these changes were a fine tribute of public confidence in the leadership of him we memorialize today.

In that remarkable address which Judge Davis made last August to a section meeting of the American Bar Association, he related an incident occurring during the arguments in *Tyler* v. *Judges*, etc., before the Supreme Court at Washington. Mr. Justice White inquired of the late Attorney-General Knowlton, "What is there in this law to prevent free and unbridled collusion between the court and the lawyers and petitioners?" To which Mr. Knowlton made this historic reply, "absolutely nothing, Your Honor, except the traditional character of the bench and bar of Massachusetts." Judge Davis sustained that high prerogative in every act of his judicial career.

Ill fares the day when his successors do less.

Judge Davis was trained in the law. Following a collegiate education at Harvard he passed on to its Law School and when admission to the bar followed he had a wide and firm foundation on which to build a judicial superstructure. Add to this a genuine love for his profession, tireless industry, the opportunity which came to him early in his mature life and you have the key to his notable career. But training and opportunity alone were not all that was needed. There had to be an endowment from the unknown of accurate logic to apply to a tangled mass of facts, to appraise and liquidate them and then apply to the residuum correct rules of law. Judge Davis possessed this gift in a remarkable degree. Let this fact speak for itself. Since 1924 there were 31 of his decisions taken to the Supreme Judicial Court on appeal and only one was over-ruled.

It is a popular delusion of most people that a judge of this court is "sitting", as the expression goes, to hear contested cases only.

As a matter of fact the uncontested features of the Land Court are the more important part of its work. They were the moving cause for establishing a separate court to conduct an administrative measure of reform in real estate title holding within the limitations of judicial power. It was here that Judge Davis performed his most important and least acclaimed judicial work. Every uncontested case under our original jurisdiction which came to him was studied with the same care as a contested case and these were obviously much more numerous.

Here again his gift of logic and habits of thoroughness fall just one case short of a perfect record in the thousands of orders for decrees which he made.

As the work of the Land Court grew, general problems of administration increased the labors of Judge Davis, largely in the field of advice and official instructions to assistant recorders in the several counties of the Commonwealth and in daily consultations with members of the bar.

Within the structure of the central office Judge Davis saw early the need of a plan and survey division in order that decrees might establish boundary lines as well as title in fee. To his foresight in this regard land owners are indebted for the admirable work now carried on under the supervision of Mr. Humphrey. No contest after decree has ever arisen over a boundary line.

In contrast it is well to note that just such questions are a prominent feature of contests before decree.

I have in the foregoing remarks touched briefly on the background and prominent features in a career of distinguished public service. There is one other element in his career which should not be forgotten. The home life of Judge Davis was ideal. Mrs. Davis through all the years was ever the sympathetic and understanding helpmeet from whom he derived constant strength.

And thus at the close of a long life well lived he came in triumph, at the beginning of last autumn, to the Gate of the Celestial City.

The motion which has been made is allowed and the memorial presented is ordered to be placed on the permanent files of this court.

It is also ordered that the portrait of Judge Davis which has been presented to the court by members of the Massachusetts Conveyancers' Association this day be accepted, and, in accordance with the terms of the gift, this portrait is ordered to be hung on the wall of this court room and to so remain. In case of any change of location it is ordered that the portrait be hung and remain on the wall of any principal court room of the Land Court which hereafter may be provided.

PECULIARITIES OF MASSACHUSETTS LAW OF REAL PROPERTY—THE LAST REMARKS TO THE BAR OF HON. CHARLES THORNTON DAVIS OF THE LAND COURT.

(An address to the Real Property Section of the American Bar Association in Boston on Tuesday, August 25, 1936, about ten days or so before his death.)

R. G. Patton, Esq., of Minnesota, presiding.

Chairman Patton: "Our first speaker is the Judge of the Land Court of Massachusetts. I have a general idea as to what the Land Court of Massachusetts is. I have a further idea that the name is more or less self-explanatory, but aside from saying that it is unique, that we have nothing of identically the same kind anywhere else, as far as I know, in the United States, and that Judge Davis has been identified with the Court for a great many years, I am going to call on Judge Davis, without any further introduction."

THE ADDRESS OF JUDGE DAVIS.

Mr. President, Ladies and Gentlemen: Permit me one personal word, perhaps two. The first is that instead of having an hour and a half for an address on the peculiarities of the Massachusetts Law, I find I shall be limited to an hour; but do not be in the least alarmed, I can talk faster than that. The real explanation is this: The paper that I was asked to prepare was on the peculiarities of Real Property Law in Massachusetts, and I am going to turn my back right on the President's request and say nothing about the Land Court. The Conveyancers' Association have taken that off my shoulders, have been altogether too kind to me, and I am not the one to talk about it, anyway.*

I had looked forward to this meeting of the American Bar Association for a long time, had arranged my work and my vacation entirely with regard to it, because I thought it was going to give me the opportunity and the pleasure and privilege of meeting some of the gentlemen and ladies with whom I have been in correspondence for quite a number of years on various matters affecting the title to land.

The circumstances wholly beyond my control, but exceedingly positive—possibly this weather got some of the rest of you, too—

* EDITORIAL NOTE: See booklet on the Land Court distributed to those in attendance by the Massachusetts Conveyancers' Association.

made it utterly impossible for me to attend. I made a trade with my doctor. That, they informed me, is an exact science, quite contrary to our own profession.

He said, "I will deliver you over so that you can make a few remarks on Thursday (last week) at the Harvard Law School, and you can be sure of being present on Tuesday (this week) provided you will go through a course of sprouts".

He kept his word in both respects, and I was utterly deprived of the opportunity of attending any of these meetings of the Bar Association, except this one, and this I wanted to attend particularly—not that I have anything that will be of any particular importance or new, although some of it may be new, and some of my learned friends may not agree—but I am going to talk facts to you.

I believe that the greatest problem now facing our profession, if not our government, is whether we are to continue to develop along what Dean Pound has characterized as the common law method, or whether, as Mr. Simms has suggested, we are going to have a restatement which will then be handed down to us in the form of a code, regardless of the fact that the country is divided sectionally and also racially among people of different methods of legal and governmental development.

The Napoleonic Code, the Spanish Law, the peculiarities of Massachusetts—it is obvious that we have got to get together, but if we can get together through cooperation we are going to get a long way on our road. One of the things that have stood in the way of real cooperation on the part of Massachusetts in reforms advocated by the Commissioners on Uniform Laws, has been the extremely peculiar situation of Massachusetts in regard to the origin of its real property law.

There is hardly a State in which the title to land did not come under a direct grant, held and controlled under an existing and well-defined system of law. Nothing of the kind in Massachusetts! Now we have as far as possible to explain to those representing all these different sections, all these different local needs and methods and habits, how this curious state of affairs arose in Massachusetts and still exists, the reason for it and the necessity for it. At a friendly meeting like this it seemed to me an opportunity that could not be disregarded. It will certainly never come to me again. It seemed to me a great opportunity which should not be neglected.

The Pilgrims came here under a religious conviction that was fanatical to the last degree. They came here to a new world in which they could establish a new civilization, a new system, founded on their racial British traditions and characteristics, but absolutely free to set up a government and laws in accordance with their particular God.

The Israelites did not begin to have the same intense conviction that they were the peculiarly selected people of God, taken into a new world and given an opportunity to set up his Kingdom. It was not the universal God. There is very little of the New Testament in that. It was their own particular God and he was going to be worshipped and he was going to be obeyed and he was going to have a new world in this wilderness in accordance with his saints. That was an intense, tremendous conviction to which these men had sacrificed their fortunes, their comforts, their homes. They sacrificed their lives and they continued to sacrifice their lives here in this new world.

They had gone to Holland. Communism was not in their blood. They did not assimilate it. They came over here without any form of government. They came to take possession, led by God, of God's own land, and they recognized nothing else. That was very vital.

I quoted about a year ago before a learned society what seemed to me to be a very picturesque and very naive vote that was passed in a little town in Connecticut. I found, to my horror, my learned friends thought I was being facetious and thought I was joking, and they did not take it seriously. I take it with the utmost seriousness.

I say to you in all frankness that I believe that to be absolutely the foundation of the law of real property here in Massachusetts. They voted in solemn town meeting that the earth is the Lord's and the fullness thereof, voted that it belongeth to His saints, voted that "we are His saints." (Laughter.) They meant it! They took their title straight from God and they recognized nothing else.

Oh, they came here under a charter from the Virginia Company and whether that resulted in where they landed being part of Virginia or Massachusetts, did not make the slightest difference to them. They came here to take possession of that land in the name of their God to whom it belonged, and they meant it earnestly, deeply, every word of it.

Well, they had the racial tradition, they proposed to build this up along the lines of their racial inheritance, along the lines of the English common law. They did not bring the English common law with them. They took so much of the English common law as suited their purposes. That is all, they did not take the rest. They let their scheme of government in accordance with the immediate circumstances and they took possession of the land and held it.

Subsequently there were grants, the Royal Charter. They were a canny people. They were fair. If they found a conflicting grant or conflicting claim (and those grants and claims conflicted to a marvelous degree), they simply bought it if it could be reasonably done and took a deed, but that was not the foundation of their law.

It is said that the early settlers brought with them the common law of England. Perhaps it would be more accurate to say that they brought what they understood to be the common law or so much of the common law as was suited to their needs.

In Cooley's Constitutional Limitations is the statement: "From the first the colonists in America claimed the benefit and protection of the common law. In some particulars, however, the common law as then existing in England was not suited to their conditions and circumstances in the new country, and these particulars they omitted as it was put in practice by them."

Then he quotes from the story:

"The common law of England is not to be taken in all respects as that of America. Our ancestors brought with them the general principles and claimed them as their birthright, but they brought with them and adopted only that portion which was applicable to their condition."

The birthright went right back to the old Anglo-Saxon theory, or rather, fact, of seizin, which says Sir Frederick Pollock, has become so obscured by the intricacies of our modern record titles, "it is possible for even learned persons to treat it as obsolete."

"The Roman theory of 'true ownership' has but little place in our law," says Sir Howard Elphinstone. "The person in possession is *prima facie* the owner, and the only use of investigating the title is to show the nature of his estate. Most land owners have no knowledge what their title is."

"Actual enjoyment and control of land and the recognition of peaceable enjoyment and control as deserving the protection

of the law are the points that stand," says Sir Frederick Pollock, "in the forefront of the common law when we take it as presented by its own history and in its native authorities."

These people went aboard the Mayflower and formed their organization. They came ashore and took possession and that possession they held under that theory.

The Massachusetts Bay Colony was an entirely different sort of people, a highly educated class, not separatists, containing men of learning, men of rank, men of position, women of gentle culture and nobility. They came over here under a charter to be administered here and by them. Their hope was exactly that of their Pilgrim colleagues down in Plymouth Colony. Their hope was to establish here a vital Commonwealth, founded upon the principles of the Bible as they understood it. It was a large undertaking. Their simplicity and naivete was almost as great as that of the others in the Plymouth Colony.

When the King asserted the claim to the title in the Crown to all the land in Massachusetts and suit was brought thereon, they did not employ counsel. They sent over some learned theologians to preach that away, and nothing but the adventitious happening of the Revolution in England, when William and Mary came in, saved them from an adverse decision which would have taken the titles away entirely from these people, based on their convictions. But just think, ladies and gentlemen, what further effects it would have had. You would not have had to listen to me this afternoon. (Laughter.)

What are some of these peculiarities of Massachusetts law? How did they arise and what is the trouble? Every time we get together and try to sit around a round table, we are up against this proposition of this peculiar situation in Massachusetts. They do not understand it elsewhere. I do not blame them.

Let me take the first one in point chronologically, though not importance, because it is very much alive today. One of the most fruitful sources of unnecessary litigation and irritation that I know of, with which my Court has anything to do, and it runs all around the entire seashore of Massachusetts, is the law of the foreshore. I am not going into the very interesting questions on which a flood of light has been shed of late by the researches of Mr. Nathan Matthews and Mr. Phillips of Fall River.

I do not care on just what theory it was built. I am after the fact. The fact is that for one hundred and fifty years one of

the most vital contentions between the land owners from whom most of our Puritan settlers came, and the Crown, was the ownership of the foreshore, to the full privileges of access to and control of the foreshore for fishing purposes.

The King raised the question, which went on for nearly one hundred and fifty years. Finally, the question was raised and suit was brought and the Chief Baron decided against the Crown. The King immediately prohibited him from sitting any further in his Court. After he died, a successor was appointed, who reversed that decision, but that decision was there when both the Puritans and the Pilgrims came over here.

They brought that with them, but whether it was in reliance on that or whether it was an ordinance or whatever it was makes very little difference. It was the assertion of what they considered their inalienable right and laid down at the very beginning as Englishmen to the ownership of the foreshore, as early as 1626 in Plymouth Colony and in the famous ordinance of 1641–47 in Massachusetts Bay Colony.

What is the result? It does not obtain anywhere else. People come up here from Rhode Island and from New York and Pennsylvania and Virginia, where the title to the foreshore is in the public,—"the public have rights everywhere, of course, they have." Then they strike Massachusetts and the public is prohibited. It is private property, subject to the rights of navigation, of fishing, yes, but otherwise private property. They do not understand it and cannot understand it.

Well, that law has been established for nearly three hundred years here and all of our foreshore is held under it, and it was one of the vital principles for which they contended. It is natural enough that other people under other systems of law should be irritated by that peculiarity of Massachusetts law, but there it is.

The next point is the one great, important point, to my mind, in the whole business and that is that the development of the law in Massachusetts as to the title to the land was wholly governed by the circumstances of the case. They fitted their suit to their cloth. As Professor Morrison quotes one old Pilgrim Father, "Let the government be as the materials be."

In some instances they simply gave permission to certain settlers to go and settle in a particular locality. They went and settled. It was not for years after that there was any grant made, and then it was of that of which they then stood possessed. In

other cases they would make a grant to the inhabitants as a tenancy in common in fee simple. In other cases they made a grant to certain specific individuals.

In one case they drew it one way. When the next case came along, they drew it the other way. They did develop their whole system in accordance with the needs of the people at the time and under no rigid system of law, but in accordance with the principles of the common law in England as far as applicable and convenient to them.

They were not opposed to law and order. They were not opposed to the common law as such. They wanted to develop along that line. They were here to get away from the oppression of the Crown which they believed to be unwarranted and an infringement on their rights from the oppression of the Courts as they then existed, and from the oppression of the Church. That was what they were here for, but intended to develop along natural racial lines. This is manifest from a very early request made by Harvard College that there be attached to the college a layman learned in the common law, to teach the principles of the common law of England. Harvard, as President Conant pointed out last Thursday, was not a Divinity School. It was a University.

Their faith was amazing. They started with a University in the hope and with the strong belief that, having built up and provided for a University here, under the local control and in accordance with their own system of law and religion, their friends at home would flock over here and would come here from the Universities over there where the Church no longer enabled them to have a standing.

So this development along the lines of the common law took place.

Getting down, very rapidly, to some of the other peculiarities of Massachusetts law that have stood in our way when we have tried to be uniform—I think by cooperation these things can be arranged, but I do believe it has got to be by cooperation and through what Dean Pound chooses to call a common law development and not a code in accordance with which the needs, customs, traditions, methods of dealing with the titles to the land must conform on the part of the people, but which will be adjusted to conform to the needs, demands and local traditions and customs of the people.

One more point that just flashes into my mind. Under the recent extraordinary development of means of communication the law today of real property, as actually administered in any part of the United States in a town of a certain type and of a certain population, will be practically the same and quite as utterly and as radically different from a neighboring industrial center as if it was in another section of the country.

This common law development has left us with our mortgage situation. I am not going to say much about that because it is one of the subjects under consideration. It is touched on, but our mortgage situation is totally different in Massachusetts from what it is in other places.

Take, for example, the matter, and it is a serious one and a current one, of the rights of the Federal Courts in bankruptcy with regard to a mortgage. It has never yet squarely come up on a Massachusetts mortgage case, but it has been a good many years in coming. Over forty years ago I was asked for a written opinion on that by a counsel for a Savings Bank in a town in which one of the leading industries had gone into bankruptcy. He happened to be a very old friend of the presiding judge. He went down to see him and he read him my opinion.

Judge Brown said, "Well, Charlie, I believe that your young friend is right and I believe that if this matter ever comes before the Supreme Court of the United States on a purely Massachusetts case and comes up before it has said so many things in relation to the rights of the Bankruptcy Court, where the mortgage is not a Massachusetts mortgage, that it is too late, I believe they will sustain Mr. Davis. I am quite confident of it, but until that happens, Charlie, until that happens, I shall keep you in jail if you foreclose that mortgage". (Laughter.) So we did not foreclose the mortgage.

Our mortgage is perfectly satisfactory from our standpoint. Some years ago the form of the mortgage, of the covenants and the method of foreclosures were prescribed by statute and if that is complied with, a good title results. That does not cut off equities, but you have a final and definite cutting off of everything subsequent to the mortgage.

Mortgage in Massachusetts is a deed absolute upon a condition. If that condition is not complied with, then by statutory foreclosure process any right of redemption is cut off and that which passes is that which the mortgagee was authorized by the

power in his mortgage to convey, namely, the title then conveyed by that deed,—absolutely prior, absolutely paramount to everything and anything that might subsequently follow.

There is the danger of equities, yes, but they are like lots of other dangers that we conveyancers have to face. It is customary, unless there is some reason for smelling a mouse, to pass them and they pass in thousands in every week. Once in a great while there is a hardship where there have been equities that have intervened that the examiner did not know about.

So far as the Land Court is concerned, we by standing order, have authorized our Registers of Deeds, and Assistant Recorders, to pass them unless there is something in the circumstances to put them on their guard. I have never had a case yet in which that something occurred. They will telephone up, call me and tell me all about the situation as it is and come to the conclusion that it is safe to pass it.

That situation, with regard to our mortgages, you could not change here. Our people have grown up in it for years. They have grown up under this method under this habit of doing business under this way of borrowing money. If you should make a radical change in that, I do not know where you would begin or where you could end, and it would all be to the disadvantage of everybody concerned. So there is another peculiarity of our law, that with regard to mortgages.

Then there is another, and I have only one more to mention. That is the indefinableness of location. When the authorities in Washington, bless their hearts, send on and demand an abstract of title, they get something that nobody except the local conveyancer, familiar with the whole history of the title and of the locality in that immediate vicinity could possibly understand. (Laughter.)

It is an awful mess, the country title in Massachusetts. Our country title is becoming our most valuable one. Our seashore fronts which once were valuable for commercial purposes and shipping, went into a long period of innocuous desuetude, and monuments, wharves, and everything disappeared. They came back to summer residences.

It all depends on where certain ancient monuments were, back before anybody really remembers anything. It takes a long search and a good deal of guessing and a great deal of local testimony to locate what the land was. For example, a deed of

one ton and a half of salt hay down on the Cape. It is not a very definite description of the tract of land you are going to acquire the title to, if that is all you have. That depends on what kind of salt marsh land it was. It may have been productive and your ton of hay was only an acre; it may have been most unproductive and it took four or five acres to make it up.

You get a cow right up on Cape Ann. If the cow was on the land side of the sheltering rocks on Cape Ann, she had pretty good feeding. You get a definite and well-defined parcel of land. If it was on the other side, it might have spread around for acres but you get enough to keep a cow.

That is the way these old things went. That, naturally, resulted in our building up a very strong set of titles on adverse possession, pure adverse possession. It is the best title in the world, but you cannot borrow money on it. (Laughter.) They fenced it off. We have them all the time and it is amazing how local testimony, perfectly God-fearing, honest people will differ in regard to it, and it is wonderful how the same witness' testimony will differ at different times.

It reminds me of Chief Justice Holmes who once wrote one of my associates who asked him if he would refresh his memory about a certain matter. Holmes wrote back and said, "I am sorry I can't. It is too far back. I do not want to get into the class of an old friend of mine who, before dinner could remember George Washington and after dinner could remember Christopher Columbus." (Laughter.)

The last word I want to say to you,—these are most of our peculiarities but you see they are essential. You see how they sprang up. You see that they really exist and I think with a reasonable amount of consideration you will realize that you could not possibly apply the mechanics lien law which Mr. Hoover put forth when he was Secretary of Labor, and was very displeased with our Legislature and our Uniform Law Commissioners because they could not recommend it. I had only one thing to do with that. The Legislature sent for me, the Committee. I went up there and they said, "All we want to know is just one thing. How will this work?" I said, "Mr. Chairman, it won't work at all. It can't."

That is all there was to that. (Laughter.) I said, "But I think we can, by getting together, get somewhere with it."

Now I come to a very embarrassing matter which perhaps I

ought not to say anything about, and yet I want to, because I have been asked about it over and over and over again, and that is a matter of our Land Court. I am not going to say a word about the Land Court itself. I am leaving that to my more than kind friends in the Massachusetts Conveyancers' Association.

The only point I want to make is this: In a state as old as this, and with the very many traditions and especially with the very many local traditions that we have, we are a very simple and ingenuous people, taken by and large, throughout the Commonwealth. We are exceedingly so. It is a great advantage that we are just plain, simple country people and that our bar, the bar that I meet in the Land Court, is composed of the fellows in the different local communities who draw the wills and deeds and carry out the trusts and are generally the local magistrates and who are counsel for the savings banks, and these are the men whom we meet in the Land Court. That is our bar.

I have had the Attorney-General of one of our largest states sitting at my desk and telling me, "Judge Davis, it would be absolutely impossible with the large cities that there are in our state, absolutely impossible to have such an institution as you have got here. It just could not be done." I said, "Well, that is the advantage of being a rural community and a simple people as we are." (Laughter.)

It can be done and it has been done here. I am not advising it for anywhere else except under similar circumstances, but I feel sure some way can be provided that will afford a quick, easy remedy for the troubles that arise in regard to titles to land. That is all we try to do in the Land Court.

Way back in 1852 Chief Justice Shaw said he saw no reason why the idea of recording of a title should not be adapted to our methods and systems in Massachusetts, as well as the recording of a deed which was mere notice of a change of ownership. Then this land registration system was worked out by the best constitutional lawyer of his day, Alfred Hemenway. Mr. Hemenway was sole commissioner and filed a report which was unusual because it contained no word of explanation except the terms of the act reported which was passed as he drew it, President of the Bar Association, who had been a conveyancer in his early days and a first-class one, he worked out this method along purely common law ideas and said to me:

"This court is something or nothing. I don't know which it

is. It can be nothing. It is merely to save the constitutionality of registration of land.

"But in my opinion there is an opportunity and a great opportunity and much need for a tribunal that can give specialized knowledge and specialized facilities and immediate, speedy hearing and determination of questions relating to the title to land that will be binding upon the world."

Well, that depended entirely on the bar and I undertook to do it. The point I want to make is this: It isn't the judge and it isn't our very remarkable engineer. What has made the Land Court here in Massachusetts is the bar as it has grown and developed and changed its character, until now the court has jurisdiction both of law and equity over any matter which directly involves the title to land. It has been in response to the demands of the bar that use it and the real estate owners who wish to take advantage of it.

The reason that it has been a success, I think is this: this is probably the last time I shall ever make a public address and I should like to pass this on. When the case of Tyler against the Judges came to be heard in Washington, I was taken over, it being considered proper by the Attorney-General, Hosea M. Knowlton, that the court itself should be there and also because he wanted my help in brief making and one thing and another, in connection with his then young assistant, now Mr. Justice Hammond of our Superior Court. So I went over there.

My relations with him were personal and peculiar. I had been doing the work for the Attorney-General in regard to real estate titles through his office for some time. He was a great lawyer, a powerful, dominating personality, square shouldered, straightforward, direct, and most impressive, a great stickler for etiquette. When he wanted to see me he would have that intimated from the State House. I went up and was received by the doorkeeper. The door opened.

"Mr. Attorney-General, Judge Davis."

"Ah, yes, yes, come in, come in. Sit down, Your Honor. Close the door, Robinson. Now, boy, what is this court of yours trying to do now?" (Laughter.)

Well, he took me to Washington. He had a raucous whisper that could be heard all over the courtroom. In the midst of the argument of that case, Mr. Justice White turned around and said, "Mr. Attorney-General, what is there in this law to prevent free

and unbridled collusion between the court and the lawyers and petitioners?"

The old Attorney-General settled himself back and said, "Absolutely nothing, Your Honor, except the traditional character of the bench and bar of Massachusetts."

There was a pause and all of the other judges turned and bowed to Mr. Horace Gray. Judge Gray bowed back again and then, in a tense whisper that could be heard all over that courtroom the Attorney-General turned to me and said, "By God, boy, you remember that." (Laughter.)

I want to say so far as the Land Court is concerned, the bar has remembered that. We have our black sheep, we have our bad eggs in our profession as well as in any other. We have had forgers and that sort of thing, but never, so far in nearly forty years have *I* had a member of our bar go back on the traditional character of the bench and bar of Massachusetts.

The audience arose and applauded.

NEWHALL'S THIRD EDITION OF "SETTLEMENT OF ESTATES AND FIDUCIARY LAW."

Guy Newhall's careful work needs no introduction to the Massachusetts bar. In the preface to this new edition he tells us:—

"Since the publication of the second edition of this book in 1923 approximately fifty-two volumes of the Massachusetts Reports have been issued, and new statutes enacted by thirteen sessions of the legislature. This edition includes the bound volumes of the reports through Volume 289, together with most of the 1936 Advance Sheets and a few 1937 cases. Legislation is covered through 1936.

"As the published volumes of the reports are about two years behind, it is unfortunately necessary that the more recent cases be cited by their Advance Sheet references. . . .

"The unusual number of cross references may at times be confusing. It cannot be avoided, however. *So much of our probate law applies to all forms of fiduciaries* that it is necessary either to make copious cross references or to duplicate discussions in different parts of the book. . . .

"In preparing this edition the author not only has added all the new law developed since 1923, but also has thoroughly revised the original text and greatly amplified the earlier discussion of many topics, adding many entirely new subjects. The preparation of this book has represented a sentence of ten years' 'hard labor', and it is hoped that the profession will not deem it a case of 'love's labor's lost.'"

The book is published by Eugene W. Hildreth.

MR. JUSTICE IREDELL'S OPINION IN 1798 ON THE DUTY OF THE FEDERAL COURTS IN REGARD TO LEGISLATION.

EDITOR MASSACHUSETTS LAW QUARTERLY:

Some of the communications published in connection with the President's bill relating to the federal courts appear to have been based on the impression, if they were not intended to create the impression, that the right or power of the courts to declare an act of Congress to be unconstitutional and void, was conceived as something new by Chief Justice Marshall when he wrote the opinion in *Marbury* v. *Madison,* in 1803.

This understanding or purpose not only ignores the practice of the colonial courts to declare invalid acts of the colonial legislatures contrary to the laws of England, and so in conflict with the common provision in the colonial charters that the legislation of the Colonies should not be contrary to the laws of the mother country [1], but it also ignores the fact that the practice was well known to the members of the convention which framed the Constitution of the United States, and that it was assumed that the federal judges would act in the same way with respect to acts of Congress in conflict with the Constitution, as Charles Warren and others have made clear.

The justices recognized this right or power and discussed it in cases before the appointment of Chief Justice Marshall and an illuminating instance is to be found in the discussion by Mr. Justice Iredell in *Calder* v. *Bull,* 3 Dallas 386, decided in 1798. He states the case as was then and is now understood by well-informed lawyers, and as his statement does not appear to have been quoted often it ought to be of interest now.

Said Mr. Justice Iredell (at page 399):

> "It has been the policy of all the American states, which have, individually, framed their state constitutions since the revolution, and of the people of the United States, when they framed the Federal Constitution, to define with precision the objects of the legislative power, and to restrain its exercise within marked and settled boundaries.
>
> "If any act of Congress, or of the Legislature of a state, violates those constitutional provisions, it is unquestionably void; though, I admit, that as the authority to declare it void is of a delicate and awful nature, the Court will never resort

[1] See the article by President John H. Hatcher of the Supreme Court of Appeals of West Virginia, Journal of the American Bar Association, March, 1936, page 163.

to that authority, but in a clear and urgent case. If, on the other hand, the Legislature of the Union, or the Legislature of any member of the Union, shall pass a law, within the general scope of their constitutional power, the Court cannot pronounce it to be void, merely because it is, in their judgment, contrary to the principles of natural justice. The ideas of natural justice are regulated by no fixed standard: the ablest and purest men have differed upon the subject; and all that the Court could properly say, in such an event, would be, that the Legislature (possessed of an equal right of opinion) had passed an act which, in the opinion of the judges, was inconsistent with the abstract principles of natural justice.

"There are then but two lights, in which the subject can be viewed: 1. If the Legislature pursue the authority delegated to them, their acts are valid. 2. If they transgress the boundaries of that authority, their acts are invalid. In the former case, they exercise the discretion vested in them by the people, to whom alone they are responsible for the faithful discharge of their trust; but in the latter case, they violate a fundamental law, which must be our guide, whenever we are called upon as judges to determine the validity of a legislative act."

FITZ HENRY SMITH, JR.

TRIAL OF GOOD BEHAVIOR OF FEDERAL JUDGES.

This is a subject which has attracted far less public and professional attention than it deserves. The *Journal of the American Judicature Society* for August, 1937, says (at p. 59):

"Since publication of the article entitled Administration function in federal courts in the last preceding number of this Journal, Representative Sumner's bill to supplement impeachment procedure by a civil proceeding was approved by the house with a large majority. The proceeding is based upon the tenure of good behavior.

"It appears that there have been thirteen impeachments of judges, with three convictions. The latest instance brought to a head the general dissatisfaction with this mode of proceeding against a judge. A precedent was made in imposing sentence, not for any of several specific counts, but because of undefined misbehavior. But this widening of the field is not sufficient. It still permits of no way of determining judicial conduct except by very tedious senate hearings which are unfair to the accused because from day to day the attendance varies and some of the senators finally voting have attended the hearings irregularly. We have no worse instance of muddled justice, even in our police courts.

"Nor does impeachment fit into any plan for organized responsibility in the federal trial bench. What is obviously needed is responsible supervision, which will go far to prevent conduct calculated to weaken respect for the courts. With opportunity for checking on the work of the courts, and privately admonishing any judge who falls below a reasonable standard, publicly filed complaints will be exceedingly rare. Such complaints should be heard by a group of judges. The constitutionality of the proposal is well supported, but of course would have to be resolved, in the absence of the right to advisory opinions by the Supreme Court, in due course of litigation."

75TH CONGRESS
1ST SESSION

H. R. 2271

IN THE SENATE OF THE UNITED STATES

JUNE 15 (calendar day, JUNE 23), 1937

Read twice and referred to the Committee on the Judiciary

AN ACT

To provide for trials of and judgments upon the issue of good behavior in the case of certain Federal judges.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That whenever a resolution of the House of Representatives is directed to the Chief Justice of the United States, stating that in the opinion of the House there is reasonable ground for believing that the behavior of a judge to whom this Act applies, as provided in section 6, has been other than good behavior within the meaning of that term as used in section 1 of article III of the Constitution, the Chief Justice shall convene, or cause to be convened, the circuit court of appeals of the circuit in which the judicial district of the judge is

situated in special term for the trial of the issue of good behavior of such judge. The Chief Justice shall designate three judges of the circuit courts of appeal (one of whom he shall designate as presiding judge and any one or more of whom may be judges of the circuit court of appeals of circuits other than the one convened in special term) to serve on such court. Such court shall have jurisdiction to determine the right of such judge to remain in office.

SEC. 2. All of the facilities, services, and equipment of the United States in the circuit in which any such court may sit which may be appropriate and useful for the purposes of such court, are hereby made available for its use, and every officer of the United States is hereby required to cooperate with each such court and its several members and to make available all necessary courtroom and office facilities, stenographic and other services; and the clerk and marshals of the circuit court of appeals in any circuit in which any such court may sit are each hereby required to serve such court in the same manner, and as fully as they are, respectively, required to serve the United States Circuit Court of Appeals of that circuit.

SEC. 3. It shall be the duty of the managers designated by the House of Representatives to institute on behalf of the United States, and to represent the United States in, a civil action in such court to determine the right of such judge to

remain in office. In any such action, the United States shall be a party to such controversy and shall have all the rights and duties of a plaintiff in a civil action in the Federal courts and the judge shall have all the rights and duties of a defendant in such an action. All matters of procedure in any such action shall be governed by rules prescribed by the Supreme Court, but the trial shall be without a jury.

SEC. 4. If the court determines that the behavior of the judge has been other than good behavior within the meaning of that term as used in section 1 of article III of the Constitution, the judgment of the court shall be that the judge is thereupon removed from office, but no other penalty shall be imposed by the court.

SEC. 5. From the judgment of any such court, either the United States or the defendant, may, within 30 days after its rendition, but no later, appeal to the Supreme Court of the United States. Notice in writing of the taking of such appeal must be filed in the office of the clerk of the trial court and also of the Clerk of the Supreme Court of the United States, and a copy thereof must be served on opposing counsel. Such appeals shall be subject to and governed by the rules of practice and procedure now regulating appeals to the Supreme Court of the United States, or such rules as may hereafter be adopted by the Supreme Court of the United States. The judgment appealed from shall remain

in full force and effect, and shall be final and binding, unless or until it be reversed by the Supreme Court of the United States upon appeal. If the judgment appealed from be that of removal from office, the appellant shall forthwith cease to have any power, authority, or right to act as judge, but his salary shall be paid him until the determination of such appeal.

SEC. 6. This Act shall apply to all judges of courts of the United States, the District of Columbia, and the Territories and possessions, who hold their offices during good behavior, except the judges of the United States Court of Appeals for the District of Columbia, the judges of the circuit courts of appeals, and the Justices of the Supreme Court of the United States.

Passed the House of Representatives June 22, 1937.

Attest: SOUTH TRIMBLE,

Clerk.

O

75TH CONGRESS } HOUSE OF REPRESENTATIVES { REPORT
1st Session } { No. 814

TRIAL OF GOOD BEHAVIOR OF UNITED STATES DISTRICT JUDGES

MAY 14, 1937.—Committed to the Committee of the Whole House on the state of the Union and ordered to be printed

Mr. SUMNERS of Texas, from the Committee on the Judiciary, submitted the following

REPORT

[To accompany H. R. 2271]

The Committee on the Judiciary, to whom was referred the bill (H. R. 2271) to provide for trials of and judgments upon the issue of good behavior in the case of certain Federal judges, after consideration, report the same favorably to the House with an amendment with the recommendation that, as so amended, the bill do pass.

The committee amendment is as follows:

Page 2, lines 5, 6, and 7, strike out the language "or of such counsel as may be designated by the House of Representatives".

The bill here reported finds its constitutional warrant in the first section of article III of the Constitution, which provides that judges of United States courts "shall hold their Offices during good Behaviour". It sets up a court to try the justiciable issue of good behavior.

PLAN PROPOSED

The bill provides that when the House of Representatives has reasonable grounds to believe that a United States district judge has been guilty of bad behavior, that fact may be certified by resolution to the Chief Justice of the United States. A court of three judges of the Circuit Court of Appeals is thereupon constituted by the Chief Justice, which court shall have jurisdiction to try the issue of the good behavior of the judge. The Attorney General prosecutes. In the event the court determines that the behavior of the judge has been other than good behavior within the meaning of that term as used in the Constitution, its judgment shall be that the judge is thereupon removed from office. No other penalty is imposed by the court. No appeal lies from the judgment of the court.

The bill does not deal with Justices of the Supreme Court or circuit judges. Their number is sufficiently small and their national importance is sufficiently great to justify asking the Senate to try them under the impeachment power.

DIFFERENCE BETWEEN THIS PLAN AND OUSTER BY IMPEACHMENT

The only real difference between the proposed method of ouster by trial in a court and ouster by impeachment would be that the trial would be by a court instead of by the Senate, and the prosecution would be by the Attorney General instead of by House managers. The same buffer protecting the judge from those who would annoy him or make him afraid, and the same inquisitorial agency now used in impeachment, the House of Representatives, is preserved. By composition and experience the House is better adapted to do this necessary and highly important service than any other which it has been possible to locate or devise.

NEED FOR THE BILL

It is a governmental absurdity that the cumbersome machinery of impeachment must be resorted to in order to procure the ouster of a district judge.

There must be a logical relationship between the importance and power of the respondent and the taking up of the time of the whole Senate in order to try him. Stability is essential, but there is nothing more ridiculous than the picture of a whole Senate sitting for 10 days to determine whether or not a district judge ought to be removed.

If the President or the Chief Justice of the Supreme Court were being tried, the Senate would sit there day in and day out during the impeachment trial. As a matter of fact, under the plan and philosophy of our Government, the only time when the impeachment powers ought to be exercised is with respect to officers of that character. The reason assigned for the origin of impeachments is that there were offenders too powerful to be controlled by the ordinary processes of government. The commentators on the British Constitution all recognize impeachment as not an ordinary proceeding, but as a proceeding to be called into action in extraordinary times and conditions. It is the reserve power of the people to deal in some extraordinary conditions with officers of power. That is the whole place and philosophy of the impeachment power in our Constitution as it is in the British Constitution from which it was transferred.

CONSTITUTIONAL WARRANT

Section 1 of article III of the Constitution is as follows:

SECTION 1. The judicial Power of the United States shall be vested in one Supreme Court and in such inferior Courts as the Congress may from time to time ordain and establish. The Judges, both of the supreme and inferior Courts, shall hold their Offices during good Behaviour, and shall, at stated Times, receive for their Services a Compensation which shall not be diminished during their Continuance in Office.

That language is the same as though it read:

The judges, both of the Supreme and the inferior courts, shall hold their offices "so long as they shall behave themselves well."

The latter is the way it was stated in the corresponding provision of the law of England from which this constitutional provision was taken. At first, judges held office during the pleasure of the King. A great deal of complaint developed because of the effort, often successful, of the King to control the judgment of the judges. It was therefore provided in the Act of Settlement (1701) that judges should hold office during good behavior and might be removed by the King upon the joint address of the two Houses of Parliament. But it was held that the judges' commissions terminated with the death of the Sovereign. In the reign of George III it was provided that judges should hold office during their good behavior, notwithstanding the demise of the King.

When the United States Constitution was written not long after, that provision was taken bodily from the fundamental law of England, the language being changed only to make it conform to our modified governmental set-up.

"During good behavior" is by its nature justiciable, a triable issue. It is proposed by this bill to set up a court to try it.

Because a judge may be impeached for bad behavior the popular notion has seemed to be that the power to impeach for bad behavior is derived from the good-behavior provision referred to. This notion comes not from an analysis of these provisions in their relationship to governmental powers and their allocation, but curiously enough, from the influence upon the individual mind of a common acceptance. The accepting in lieu of one's own judgment of a long-prevailing idea or general attitude seems to be as controlling upon the processes of the mind and as difficult to break away from as are the ordinary habits of life controlling over the conduct of people.

This proposed legislation is not at all dependent for its authority upon the provision of the Constitution with reference to impeachments and has no relationship whatever with impeachment. The impeachment power is contained in section 4 of article II, which reads as follows:

> The President, Vice-President, and all civil officers of the United States, shall be removed from office on impeachment for, and conviction of, treason, bribery or other high crimes and misdemeanors.

That section contains all the powers which are in the Constitution with respect to impeachment. When the Senators come to exercise their jurisdiction in impeachment trials they do not look at all to the next article (III) in which the good-behavior provision is contained in the judiciary tenure clause. That does not have anything to do with impeachment and impeachment does not have anything to do with it. All impeachment powers are held within the preceding section of the Constitution. Neither the Senate nor the House in the exercise of the impeachment power of the Constitution derive any jurisdiction or power from the good-behavior clause, which is the basis for this bill.

That fact may be physically demonstrated. Suppose you strike the good-behavior clause from the Constitution, literally run a pencil through the words. Immediately it is seen that nothing has been taken from the impeachment powers. Not one iota is detracted from the jurisdiction or power now exercised in impeachments.

Now, suppose we restore those words. Nothing is added to the impeachment power. Thus we see that all the powers which the Senate has or can have are given in the impeachment provisions. It follows, therefore, that the good-behavior condition in the tenure clause of the Constitution are dead words unless made vital by some agency

other than the Houses of Congress functioning in impeachment proceedings.

It is not merely a question as to whether there be dead words in the Constitution. If these words, the good-behavior provision, do not constitute a justiciable issue, we would have not merely some dead words in the Constitution but we would have dead in the Constitution what would otherwise be as important a remedial and protective provision as is contained in the Constitution.

All commentators agree there are no dead words in the Constitution. Certainly the historical background of this provision in our Constitution precludes any notion that the Executive may vitalize this condition of good behavior. It was included in the English Constitution, from whence it came to us, for the specific purpose of denying to the Executive the exercise of any such power. By the process of elimination we come to the conclusion that only by the recognition of good behavior as a justiciable issue can these words, this important provision, be other than dead in the Constitution.

The Constitution provides two methods of ouster of Federal judges, trial by impeachment, and trial by a court. Let the analogy to the case of a State be considered. Practically all the States have provisions for ousting public officers by the judgment of a court and also by impeachment. For instance, the treasurer of a State who is guilty of embezzlement may be ousted by a court judgment. He still may be ousted by impeachment under the constitution of practically every State in this country. The fact that he may be impeached does not prevent him from being ousted by a court judgment, and the fact that he may be ousted by a court judgment does not prevent him from being impeached. The same is true with reference to Federal judges. This proposed trial of the issue of good behavior in a court is as though there were no impeachment provision in the Constitution. It is a lawsuit based upon an alleged breach of the contract of a judge to behave himself well, a condition in the contract between the judge and the people which by its nature is a justiciable issue.

This bill, of course, would not, per se, interfere with the jurisdiction of the Senate to try an impeachment case. It would not interfere with the power of the House to initiate and prosecute in the Senate. It would add a second method of procedure. Both could be tried and it could be seen which works best.

Impeachment is a blanket power operative upon all civil officers. It does not make any difference what is provided in the law with regard to tenure of office. The impeachment power that is lodged by the Constitution in the Houses of Congress is not given to them as parts of the legislature, but to the persons who constitute the House and the persons who constitute the Senate, and when they act, they act as separate entities. The House discharges its constitutional duties as a separate entity, and the Senate discharges its constitutional duties as a separate entity. They act as the custodian and trustee of a peculiar power that possesses some of the elements of all the powers of government.

Suppose the tenure clause be read again. Judges, it will be seen, are not appointed for life; they are appointed during good behavior. That is a condition included in the contract between the people and the judge. By its nature it is triable and enforceable in a suit. It is justiciable. The logical query is why is there uncertainty about it, not why should it be triable. There is no legal, constitutional, or rational answer.

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TRIAL OF GOOD BEHAVIOR OF UNITED STATES DISTRICT JUDGES

HEARING

BEFORE

SUBCOMMITTEE IV OF THE COMMITTEE ON THE JUDICIARY HOUSE OF REPRESENTATIVES

SEVENTY-FIFTH CONGRESS

FIRST SESSION

ON

H. R. 2271

A BILL TO PROVIDE FOR TRIALS OF AND JUDGMENTS UPON THE ISSUE OF GOOD BEHAVIOR IN THE CASE OF CERTAIN FEDERAL JUDGES

Serial 4

PART 1

MARCH 27, 1937

UNITED STATES
GOVERNMENT PRINTING OFFICE
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TRIAL OF GOOD BEHAVIOR OF UNITED STATES DISTRICT JUDGE

SATURDAY, MARCH 27, 1937

HOUSE OF REPRESENTATIVES,
COMMITTEE ON THE JUDICIARY,
SUBCOMMITTEE NO. IV,
Washington, D. C.

Subcommittee No. IV of the Committee on the Judiciary, Hon. Arthur D. Healey (chairman) presiding, met at 10:30 a. m. for the consideration of H. R. 2271, which is as follows:

[H. R. 2271, 75th Cong., 1st sess.]

A BILL To provide for trials of and judgments upon the issue of good behavior in the case of certain Federal judges

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That whenever a resolution of the House of Representatives is directed to the Chief Justice of the United States which states that in the opinion of the House there is reasonable ground for believing that the behavior of a judge of any court specified in section 4 has been other than good behavior within the meaning of that term as used in section 1 of article III of the Constitution, the Chief Justice shall convene, at a place and time designated by him, a court consisting of any three judges of the circuit courts of appeal designated by him. Such court shall have jurisdiction to determine the right of such judge to remain in office.

SEC. 2. It shall be the duty of the Attorney General by himself or by counsel designated by him, or of such counsel as may be designated by the House of Representatives, to institute on behalf of the United States, and to represent the United States in, a civil action in such court to determine the right of such judge to remain in office. In any such action, the United States shall have all the rights and duties of a plaintiff in a civil action in the Federal courts and the judge shall have all the rights and duties of a defendant in such an action. All matters of procedure in any such action shall be governed by rules prescribed by the Supreme Court, but the trial shall be without a jury.

SEC. 3. If the court determines that the behavior of the judge has been other than good behavior within the meaning of that term as used in section 1 of article III of the Constitution, the judgment of the court shall be that the judge is thereupon removed from office, but no other penalty shall be imposed by the court. No appeal shall lie from the judgment of the court.

SEC. 4. This Act shall apply to all judges of courts of the United States, the District of Columbia, and the Territories and possessions, who hold their offices during good behavior, except the judges of the United States Court of Appeals for the District of Columbia, the judges of the circuit courts of appeal, and the Justices of the Supreme Court of the United States.

STATEMENT OF HON. HATTON W. SUMNERS, A REPRESENTATIVE IN CONGRESS FROM THE STATE OF TEXAS, AND CHAIRMAN OF THE COMMITTEE ON THE JUDICIARY

Mr. SUMNERS. Mr. Chairman, we all agree, I believe, that the language "or of such counsel as may be designated by the House of Representatives" in section 2 of this bill should be stricken. There

will probably be suggested some clarifying amendments. I shall discuss the general plan, constitutional warrant, and administrative necessity. If we agree as to these we can then proceed to examine the bill in detail.

The bill provides that when the House has reasonable grounds to believe that a district judge has been guilty of bad behavior, that fact is certified to the Chief Justice and to the Attorney General. A court of three judges of the circuit court of appeals is constituted by the Chief Justice, and the Attorney General prosecutes. The same buffer protecting the judge and the same inquisitorial agency now used in impeachment, the House of Representatives, is preserved. I examined this feature very carefully. By composition and experience the House is better adapted to do this necessary and highly important service than any other which I have been able to locate or devise. Its use would also reduce the new and the experimental element to the minimum.

The only real difference between the proposed method of ouster by trial in a court and ouster by impeachment would be that the trial would be by a court instead of by the Senate, and the prosecution would be by the Attorney General instead of by House managers.

Perhaps it would be well to put into the record at this point section 1 of article III of the Constitution [reading]:

SECTION 1. The judicial Power of the United States shall be vested in one Supreme Court and in such inferior Courts as the Congress may from time to time ordain and establish. The Judges, both of the supreme and inferior Courts, shall hold their Offices during good Behaviour, and shall, at stated Times, receive for their Services a Compensation which shall not be diminished during their Continuance in Office.

That language is the same as though it read:

The Judges, both of the Supreme and the inferior courts, shall hold their offices "so long as they shall behave themselves well."

That was the way it was stated in the corresponding provision of the organic law—and I may call it the organic law—of England with reference to these judges. At first, as you gentlemen know, judges held office during the pleasure of the King. A great deal of complaint developed in England because of the effort, often successful, of the King to control the judgment of the judges. So, around 1700, I believe it was, when the Acts of Settlement and the Succession were drawn up, William and Mary were on the throne (after Cromwell's time); it was provided that the judges should hold office during good behavior and might be removed by the King upon the joint address of the two Houses of Parliament.

But it was later held that their commissions terminated with the death or removal of the Sovereign. When George III came to the throne, I think it was the first act of his reign, it was provided that judges should hold during good behavior notwithstanding the demise of the King.

It was not long after that time when we wrote our Constitution. We lifted that provision, as was true of most of the other more basic provisions of our Constitution, bodily from the fundamental law of England, only changing the language to make it conform to our modified governmental set-up.

"During good behavior", as you must see, is by its nature justiciable, a triable issue. We propose by this bill to set up a court to try it.

Lawyers have been reading those words in the American Constitution for over a century and a half, but do not seem to have stopped to examine them in their relationship to judicial tenure or governmental power.

This proposed legislation, as you will see from such an examination, is not at all dependent for its authority upon the provision of the Constitution with reference to impeachments. Neither does the House or Senate in the exercise of the impeachment power of the Constitution derive any jurisdiction or power from the good behavior clause in the judiciary tenure provision, which is the basis for this bill.

Because a judge may be impeached for bad behavior the popular notion seems to be that the power to impeach for bad behavior is derived from the good behavior provision referred to. This coincidence seems to have a curiously confusing effect upon the thinking of lawyers with whom I have discussed this matter. This notion comes not from an analysis of these provisions in their relationship to governmental powers and their allocation, but curiously enough, from the influence upon the individual mind of a common acceptance. I shall not be surprised if you will observe it in your own mental processes while examining the question of constitutionality of this bill.

The accepting in lieu of ones own judgment of a long prevailing idea or general attitude seems to become as controlling upon the processes of the mind and as difficult to break away from when the necessity to make an original examination and arrive at an independent judgment occurs, as one controlling the ordinary habits of life over the physical processes and conduct of people. It is a most interesting psychological phenomenon. If you escape this influence you will be an exception to the rule.

On its face this language, the good-behavior provision, fixes a definite condition in the contract of employment made between the judge and the people. It is a legal contract with its terms fixed in the Constitution. By its terms its breach terminates the right to hold office. To hold that this thing, which by its nature is triable and enforceable by a court is not thus enforceable because the judge may also be subject to impeachment would be equivalent to holding that all ouster laws in our States applicable to State officials are void because these officials may also be removed by impeachment. This provision has nothing to do with impeachment. The judge could be impeached for exactly the same misconduct whether this provision was in the Constitution or not.

Just as soon as we rid ourselves of the force of habit of thinking, or maybe it is of not thinking this thing through, which many decades of acceptance of a false notion has fastened upon us, the absurdity of this old idea will be universally accepted. Impeachment is not now, and never was, any part of the ordinary remedial or effectuating powers or processes of government. It is not in lieu of any power of government. It lies above and is disassociated from and constitutes no part of either the structure or functioning machinery which is

depended upon to give to us a government complete in its structure and operations. Impeachment had its origin in those times in England when some individuals, great personages, were more powerful than government functioning through ordinary agencies. The House of Commons became their accuser and prosecutor, the House of Lords their trier. Certainly district judges are not above the remedial powers of the law. That is what makes so ridiculous the present exercise of this extraordinary power of government as the only remedy, prosecution by the House and trial by the entire Senate, especially when we may make available the ordinary procedure through the trial in a court of an issue of exactly the character which is being tried every day in the courts of the country. The very purpose for which courts are created is to try just such issues as this one of good behavior.

Not only do we discover that it is a triable issue when we disassociate ourselves from the idea of removability only by impeachment just because everybody accepts it, but we discover that only by the exercise of the powers of the judiciary can those words have any effect in the Constitution.

The Senate cannot make those words effective, because all its powers are contained in section 4 of article II. It cannot reach down to section 1 of article III; it has no right to do down to article III for an impeachment power. There are no impeachment powers in that section. That is an ordinary court power. There would be no necessity to go down to article III for power to remove a judge for bad behavior. Such behavior has been a recognized ground for removal by impeachment since that power was first exercised in the fourteenth century.

What provision of the Constitution says we cannot confer upon a court jurisdiction to try this issue? What was the sense in putting this condition in the tenure clause unless it could be enforced. It was not necessary in order to subject judges to impeachment. The Senate cannot enforce this language. It can do as much under article II, which fixes its powers and jurisdiction, without this clause in the Constitution. This is for the courts, not for the Senate. If it is not for the courts, it is for nothing.

Everybody agrees that all the language in the Constitution is vital. There are no dead words in the Constitution. Well, clearly, a court is the only agent of this Government that can make or keep those words vital.

That fact may be physically demonstrated. Suppose you strike the good-behavior clause from the Constitution. Literally run a pencil through the words. Immediately we see that nothing has been taken from the impeachment powers. Not one iota is detracted from the jurisdiction or power now exercised in impeachments. Now suppose we restore those words. Nothing is added to the impeachment power. Thus we see that all the powers which the Senate has or can have are given in the impeachment provisions. These words, therefore, are dead words in the Constitution unless made vital by some agency other than the Houses of Congress functioning in impeachment proceedings.

But it is not a question as to whether there be mere dead words in the Constitution. If these words, the good-behavior provision, do not constitute a justiciable issue, we would have not merely some dead words in the Constitution but we would have dead in the Constitution

what would otherwise be as important a remedial and protective provision as is contained in the Constitution.

Certainly the historical background of this provision in our Constitution precludes any notion that the Executive may vitalize this condition of good behavior. It was included in the English Constitution, from whence it came to us, for the specific purpose of denying to the Executive the exercise of any such power. By the process of elimination we come to the conclusion that only by the recognition of good behavior as a justiciable issue can these words, this important provision, be other than dead in the Constitution.

Suppose we read the tenure clause again. Judges, as you will see, are not appointed for life; they are appointed during good behavior. It is a condition included in the contract between the people and these judges. By its nature it is triable and enforceable in a suit at law. It is justiciable. The logical query is why is there uncertainty about it, not why should it be triable. There is no legal, constitutional, or rational answer.

Mr. HEALEY. Do you have the impeachment section of the Constitution before you, Mr. Chairman?

Mr. SUMNERS. Yes. [Reading:]

The President, Vice-president, and all civil officers of the United States, shall be removed from office on impeachment for, and conviction of, treason, bribery or other high crimes and misdemeanors.

You gentlemen will have in mind the other two provisions of the Constitution which lodge the power to initiate impeachment proceedings in the House, and the power to try, in the Senate. Section 4 of article II fixes the jurisdiction.

When the Senators come to exercise their jurisdiction they do not look at all to the next article, III, in which the good-behavior provision is contained in the judiciary tenure clause. That does not have anything to do with impeachment and impeachment does not have anything to do with it. All impeachment powers are held within the preceding section of the Constitution.

If we can get that clearly in our minds, we will be rid of any confusion about the power or the right to recognize this as a justiciable issue. This does not seem easy for the American lawyer to do. That is why I am constantly recurring to and emphasizing this point.

You gentlemen, when you come to examine section 4 of article II, I am sure will agree that all the power that the Senate, sitting as a Court of Impeachment, can possibly have is to be found in that section.

When you come to examine the impeachment powers, also, you will discover they are entirely independent of any general powers of government. They are not to be considered in connection with such general propositions, for instance, as that you cannot prosecute a man twice for the same offense. This power is entirely independent. In many respects it is the most interesting power exercised by government. To use this most extraordinary power, suitable only to most extraordinary conditions, for the ordinary purposes of ouster of minor officials, is a governmental absurdity.

This proposed legislation, if adopted, could not disturb the power to impeach, which is fixed by the Constitution, not in the Congress or in its bodies as a part of the Congress, but in the persons who

constitute the House and Senate. This is important and we had as well recognize it.

Impeachment powers of this Government, as an ordinary ouster agency, just like the impeachment powers of England, have got to fall into disuse, especially as now exercised. The procedure is too cumbersome. It casts entirely too heavy, too disproportionate a burden upon the governmental machinery, especially of the Senate, already overloaded under its ordinary duties. The spectacle of the entire Senate turning aside from the discharge of its legislative duties to sit for many days trying an ouster suit against a district judge is too violative of the national interest. It is just too ridiculous long to endure. There is nothing logical or sensible about it.

The Senate is not a judicial body. They do their best, no doubt, but they have many duties. Their minds are distracted. They are in and out of the chamber where the trial is being conducted. They are not able to give either the respondent or the Government the hearing which the private rights of the respondent and the public interest involved ought to have. They are legislators.

When the House of Lords was really the supreme court of England, and when this impeachment procedure originated, it was in harmony with sound governmental policy to have them try the issue arising in an impeachment. But as legislative duties increased and the issues in litigation became more complex, the House of Lords surrendered first to the great law officers and finally to regularly constituted courts practically all of their jurisdiction as a court. Impeachment has fallen into disuse in England. By a natural process governmental powers are lost by agencies of Government not able properly to exercise them. That is how we came to have the three branches. The legislator is not qualified to be both legislator and judge.

It is interesting that while the House of Commons have in their unwritten constitution a provision—we took ours from it—that each house shall be the judge of the qualifications of its own members, etc., the House of Commons do not now try any election contest, as we do. They refer it to judges.

When we see Senators coming and going, attending to this thing and that which they are compelled to attend to while the impeachment trial is going on, we ought to be persuaded that we have got to do something about it. I do not say this in criticism of the Senate. They are under the call of important conflicting duties. Their duties are getting heavier all the time.

This bill, of course, would not per se interfere with the jurisdiction of the Senate to try an impeachment case. It would not interfere with the power of the House to initiate and prosecute in the Senate. It would add a second method of procedure. We could try them out and see which one works best. It will be noted that it is only district judges who are to be affected by this bill.

Gentlemen, I appreciate your interest and attention. I apologize for my frequent repetition. My apology is that new ideas like this one have great difficulty in finding permanent lodgment in the places which for a long time have accommodated others. Old ideas, however erroneous, do not readily surrender to the usurpation of those newly arrived. I do not think I ought to take any more of your time on this beautiful Easter Eve, unless you want to ask some questions.

Mr. HOBBS. The distinguished chairman of our committee referred to the surrender by the House of Lords of their prerogative as the supreme court, in essence, of the British Empire. I would like to ask if it is not a fact, slightly different from that implication, that it lost its power by throttling from without and over its protest, rather than from within by surrender?

Mr. SUMNERS. I am not sure, Judge, whether I understand your question. I think I do. You are speaking now with respect to their general powers as of the judiciary of the country?

Mr. HOBBS. Yes, sir.

Mr. SUMNERS. I have not made a careful examination of it, but I think there was an inconsistency between their position as a part of the legislature and as the supreme court.

In other words, there was a fundamental inconsistency there. A great many of them were lay lords; that is, they did not have the legal qualifications. When the problems that came before them were very simple, probably they could do very well. But even before they began to appoint law lords, the chief law officers of the country really determined the questions wherein they rendered judgments.

Power is lost by a natural process when the capacity properly to exercise it is lost. Take the constitutional power to try election contests. Sooner or later we will lose it. I have seen a number of election contests in the House. Clearly the House owes a duty to sit as judges without regard to political consequences. In other words, justice requires that the judge be concerned only with ascertaining the facts, and then to render a judgment which, under the law, ought to be rendered, when the facts are ascertained.

But, as you know, it is a terrible strain on members of the House in certain circumstances. For instance, let us say we have a Democratic President, a Democratic Senate, and a Democratic margin of just one in the House: Here comes a contest between a Democrat and a Republican for a seat in the House. In that situation it is tremendously difficult for Democrats properly to weigh all the facts in such a case and sit as judges.

The day is coming when we will try those issues before judges.

Nature is very interesting. The plan of nature is affected as much by the limitations put upon human capacity as by the capacity given to human beings. That is my judgment and I have been watching it.

Here is a Member of the House, who is also a member of a political party. He has his party blood up. It is very difficult to give a fair trial when, if he decides in favor of one, his party loses control of the House. In a lesser degree perhaps party impulses and considerations are present in impeachment trials. It is much to assume they are entirely absent from the mind of all Senators sitting as judges in an impeachment trial. I trust that these observations give no offense to any Senator. I am discussing this matter purely academically.

Mr. HOBBS. Judge, that is very interesting, but what I meant by my question was to draw your attention to, and to obtain your enlightening comment upon, the fact that the decline in the powers of the House of Lords began with the packing of the House of Lords in 1832.

Mr. SUMNERS. You mean when the King wanted a certain legislative policy with which the House of Lords would not agree? I am

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not familiar with that date, 1832, but I am familiar with the one which culminated in the act of 1911, I believe it was.

Mr. HOBBS. I knew you were. To refresh your recollection, I think in 1832 it was the House of Commons enabling act which was under consideration. The lords refused to concede that additional power to the House of Commons. The King promised the Prime Minister to increase the House of Lords by calling to the peerage a sufficient number of new lords in order to accomplish the purpose of overriding the will and the decision of the House of Lords.

Mr. SUMNERS. That was with regard to legislative matters?

Mr. HOBBS. Yes, sir; it was with respect to the whole policy, but primarily in this instance, legislative matters.

Mr. SUMNERS. I never heard of any threat to pack the House of Lords because of any judgment rendered by the House of Lords as a court.

Mr. HOBBS. That is true; it was just a gradual diminution of the power of the House of Lords largely as a legislative body. But it was first packed after the King went back on his promise in 1832; it was later in the year, after they had riots in London and elsewhere, that it was packed—late in that year or the next. It has been packed three times since.

I know that you had told me of the experience in 1911, and I wanted to get a statement from you, if you would, on my question. Is not that the implement that has been used in England to kill the power of the House of Lords?

Mr. SUMNERS. Here is what I think. I think the House of Lords, as a matter of fact—to be entirely candid with you—lost their powers in part because of the abusive exercise of their hereditary powers; because of their failure to respond as the representatives of the people and effect the legislative will of the country. I am now talking about legislation, power in legislation.

You have got to separate the exercise of their policy-fixing power from their power to sit in judgment and ascertain facts, and determine what ought to be done under the facts and under the law.

Now, this is interesting, and I think I may take just a moment to mention it. Notwithstanding the House of Commons now has the power to destroy the House of Lords at any time, it does not do it. It does not do it because there is a feeling over there that they need that conservative check. In other words, they have some sort of recognition that there do come times when the brakes are just as valuable as the accelerator. It may slow up speed a little, but helps to keep out of the ditch.

I do not, of course, want to take up your time with that; that is aside.

Mr. HEALEY. It is all very interesting.

Mr. SUMNERS. Yes; it is interesting.

Mr. HOBBS. Judge, to get down to the milk in the coconut in this bill. I have given quite a good deal of study to it, as you know; have been profoundly interested in it.

The only thought in my mind with respect to this bill that might be considered critical—and I would like to get your view on it—is as to its provision for initiating proceedings in the House, or either branch of the Congress, for that matter.

Mr. SUMNERS. In the House.

Mr. HOBBS. I know; I say either branch. Here is what is in my mind, frankly. I doubt if we will have any criticism whatever on any point than that.

Mr. SUMNERS. I realize that.

Mr. HOBBS. Because it is the concensus of reasoned opinion, as I read it, that the purpose of including the power of impeachment specifically was that it was conferring a power to initiate and try upon a coordinate branch of the Government, and therefore it had to be specific and it had to particularize in the delegation of that power to the coordinate branch of the Government.

Now, for the purpose of getting your comment upon it, I am questioning whether you think that it is better in this bill, to confer that initiatory power upon the House or whether it would be better to pass an enabling act conferring initiatory power as well as trial power, upon the judiciary.

Mr. SUMNERS. You mean, have the judiciary itself initiate the proceedings?

Mr. HOBBS. Yes, sir.

Mr. TOLAN. That is in the Constitution, that it must originate in the House, is it not?

Mr. HOBBS. No, sir; that is the impeachment clause.

Mr. SUMNERS. I gave some consideration to that very thing you suggest. I gave consideration to whether or not the Attorney General should do this on his initiative. I can appreciate the objection to the House doing it.

Of course, one thing we must do. We know that. Those of us who have been on this committee and have had these complaints come in from people who want to annoy judges, know that we have got to have a buffer between the judge and a complainant. In other words, you could not have a situation whereby just any private person who is aggrieved could come in and bring suit, so to speak.

Mr. HOBBS. That is correct.

Mr. SUMNERS. It would be giving too much power to the executive branch of the Government to have the Attorney General privileged to bring a suit against a Federal judge before whom, he, as the representative of the executive branch, is constantly appearing in behalf of a litigant.

Mr. HOBBS. I agree with you.

Mr. SUMNERS. Now, the House of Representatives is a trained body, particularly its Judiciary Committee, in these impeachment ouster proceedings against Federal judges. There would be the same necessity to have a buffer under what is proposed as is now necessary when impeachment is the only method of ouster. We are what you might call experts in being able to determine whether the complaint comes from a person who is a disgruntled litigant, or from some powerful interest that would want to make the judge afraid, or comes as a public protest against a public official who has betrayed his public trust.

While we are elected every 2 years, as a matter of fact, the House, in practice, is a continuing body. Generally speaking, much less than one-third of our House, I imagine, goes out at each election.

I concluded in view of the fact that the House has a pretty fair record in making the preliminary investigation, that it continue to do its grand-jury work, continue to make the preliminary investiga-

tion, protect the judge, and protect the public interest insofar as initiating ouster proceedings is concerned, and instead of going through the trial in the Senate in each instance as now, let the matter be tried in a court, at least try that plan out. I believe the Senate would be glad to be rid of this rather incongruous responsibility.

If you gentlemen feel you can work out a plan that would be better, I should be glad to have you do it. This is the best I can do, and it is as far as I would be willing to go without the benefit of experience. I do not favor radical disturbance of things established when the only guide is the guess of a human mind as to how it will work. I favor taking nature in as a working partner at the start and let it do most of the work.

In this plan we would have the same old proceedings. The only difference would be a trial in the court instead of in the Senate.

Mr. HOBBS. And that is why, if you will pardon me, I am fearful of it. I am afraid of the analogy to impeachment. I am 110 percent in favor of your suggestion as embodied in this bill. I think that is far better. But I am questioning now the advisability of it because, as I fear—I would not say I believe, but as I fear—it may lay the bill open to constitutional objection in that it provides for the initiation of a proceeding, although not the trial, in a coordinate branch of the Government rather than in the branch that has innately and from the beginning the power to purge itself under the Constitution and under the good-behavior clause.

Mr. SUMNERS. Whether the judiciary has the power to purge itself and oust a member appointed for life, on its own initiative, within itself, would be a pretty serious question, would it not?

Mr. HOBBS. I do not think so; if you hold that the executive department has that power within itself, and the legislative branch has that power given specifically to it by the Constitution.

Mr. SUMNERS. You mean to purge itself of its own members?

Mr. HOBBS. The legislative branch has that power to purge itself.

Mr. SUMNERS. Yes; by the Constitution.

Mr. HOBBS. And the executive department has that power, the Supreme Court has so held.

Mr. SUMNERS. Under the Constitution. It is an incidental power associated with the Executive responsibility. In other words, here is an Executive; he has Executive responsibility and is given the privilege of selecting the tools with which he works, because he has that responsibility.

Mr. HOBBS. That is right.

Mr. SUMNERS. I do not believe you find any such power in the courts.

Here is a thought. We are not to do this as an independent act on the part of the House. If it is to be done at all, it is to be done by a law passed by the House and the Senate and approved by the President. In other words, all these agencies of the Government have part in lodging this power in the House. After all, we do not render any judgment.

This simply provides for the initiation of the proceedings by the House, and the law officer of the United States, as he does in all cases where the United States is a party, represents the United States. Do you see my point?

Mr. HOBBS. Yes, sir.

Mr. MICHENER. As a matter of fact, the legislative branch would indict the judge and we would submit it to the judicial branch for trial?

Mr. SUMNERS. Here is what we do. We would pass a law setting up a tribunal and giving it jurisdiction. Then we designate the Attorney General to represent the Government in that proceeding. The Attorney General proceeds upon the suggestion.

The legal effect would be a suggestion on the part of the House, clothed with the power by law to make the suggestion, that this matter ought to be prosecuted.

Mr. MICHENER. This would not interfere with the present procedure so far as impeachment is concerned, if I understand you.

Mr. SUMNERS. Not a bit; I am certain of that.

Mr. MICHENER. In other words, the constitutional power of impeachment would still exist?

Mr. SUMNERS. Yes.

Mr. MICHENER. But we here bring into play another method whereby we accomplish the same purpose that the Constitution provides shall be accomplished, but by a shorter route than by impeachment and trial in the Senate.

Mr. SUMNERS. The Constitution provides two methods of ouster. It provides for impeachment. That is a blanket power operative upon all civil officers. It does not make any difference what is provided in the law with regard to tenure of office. The impeachment power that is lodged by the Constitution in the Houses of Congress is not given to them as parts of the legislature, but to the persons who constitute the House and the persons who constitute the Senate, and when they act, they act as separate entities. The House discharges its constitutional duties as a separate entity, and the Senate discharges its constitutional duties as a separate entity. They act as the custodian and trustee of a pecular power that possesses some of the elements of all the powers of government, every one of them.

When you look at the provisions of the Constitution, if you were just leave out of the picture the impeachment powers, if you were to suppose that there are no impeachment powers provided, you would see that the Constitution provides that the judge shall hold office as long as he behaves himself well. He is not appointed for life. He is appointed so long as he behaves himself well.

Suppose that there were no impeachment powers provided for in the Constitution. What would happen? The judge would be charged with misbehaving himself. The only way that you could effectuate that condition is by trial. It is a triable issue. So far as the impeachment provision is concerned, it is a blanket provision, dissociated from all other arrangements governing public officers. It has no proper place in the consideration of the constitutional power to enact this bill.

Mr. HEALEY. But impeachment may be brought only for the failure of the judge to behave himself well.

Mr. SUMNERS. Well, that is what it amounts to, because high crimes and misdemeanors would be regarded as misbehavior, but a judge is impeached for high crimes and misdemeanors, not for not behaving himself well.

Mr. HEALEY. You place quite a distinction between those two terms, misbehavior and high crimes and misdemeanors?

Mr. SUMNERS. In theory I do. The House complains and prosecutes, and the Senate impeaches for high crimes and misdemeanors. We elect our President for the term provided in the Constitution of 4 years, but he could be impeached for high crimes and misdemeanors, and if convicted, the term of service terminated. We give commissions to our officers, but they still are subject to removal by impeachment for high crimes and misdemeanors. You can take them out 2 days after they have been put in office.

All officers except Federal judges are separated from office by two methods, termination of the period of service, impeachment, and also there are removals by the President. Judges are not subject to separation by expiration of a period for which selected, but to offset that element of popular control they are removable by a judgment of a court for bad behavior in office.

Mr. MICHENER. Is it the purpose of this measure to try these judges for something short of what the Constitution designates as high crimes and misdemeanors?

Mr. SUMNERS. In practice it would not be for something short of that. I will say this much, that if a judge is guilty of things that make him subject to impeachment, speaking generally, that is not good behavior. That is so, is it not?

Mr. MICHENER. Yes; that is so. But we had quite a time, as the gentleman well knows, in determining just what amounted to misbehavior. Before you could impeach a man now who holds a life tenure, we would have to determine that he had committed high crimes and misdemeanors, and we would have to determine the type of conduct that constituted high crimes and misdemeanors.

Now, what I am getting at here is this: Are we attempting to remove a judge who holds life tenure for a lesser offense than high crimes and misdemeanors, as contemplated by the Constitution?

Mr. SUMNERS. Practically speaking, I would say probably not, but, you know, it takes a good deal of thinking to get this thing straightened out in our minds. We keep getting back to impeachment all the time. If we can get into our minds that impeachment has nothing to do with article III, upon which this bill is based, then we would not have so much difficulty.

Let us take, as an illustration, the case of a State. Practically all of the States have provisions for ousting public officers who do certain things. For instance, an officer who is guilty of misfeasance or malfeasance in office can be ousted by a court judgment. He still may be ousted by impeachment under the constitution of practically every State in this country. There can be brought an ouster suit against him, or impeachment if his acts warrant that, but the fact that he may be impeached does not prevent him from being ousted by a court judgment, and the fact that he may be ousted does not prevent him from being impeached.

We have for so long considered that these judges hold office for life. They do not. They hold office under their commission only as long as they behave themselves well.

Mr. MICHENER. The President holds office for 4 years, or during his term of good behavior.

Mr. SUMNERS. That is right.

Mr. MICHENER. He can be impeached at any time.

Mr. SUMNERS. Yes.

Mr. MICHENER. Then, under the Constitution could you refer the President's case to this court, the same as you propose to do with the case of a judge?

Mr. SUMNERS. No; but I am not at all certain that we could not put a provision in the law providing for the ouster of subordinate public officials of the United States whose conduct is bad. I have never examined into that. There would be difficulty. But speaking generally, government has control over the conduct of its public officials. Government is not wholly dependent upon the power of impeachment in order to protect itself against a corrupt officer, for instance.

Mr. MICHENER. As a matter of practice, we have always considered a President who misbehaves in office on the same footing as a Justice of the Supreme Court of the United States who misbehaves in office, and inasmuch as that has been the situation always, I was wondering just how far we could go in treating the different officers in a different way so far as ouster is concerned.

Mr. SUMNERS. Here is the difference. We have already got it in the Constitution that judges hold office only during good behavior. There might be some question about other officers. That is not necessary to consider here. But it is perfectly clear from the Constitution that when they gave these judges a life tenure, they tied up with it the condition of good behavior which runs every day with that tenure.

Mr. MICHENER. If this were the law today, and I desired to impeach a Federal district judge, I would be permitted to rise on the floor, as we would now under the procedure, to impeach the judge?

Mr. SUMNERS. That is right.

Mr. MICHENER. Then that would come to this committee, and if this law were on the statute books, what would happen then? Would the committee have the option to report back an impeachment under the Constitution, to go to the Senate?

Or would it have the option of reporting a resolution indicating that the Chief Justice of the United States should assemble a court to try that matter?

Mr. SUMNERS. Of course, if they were acting under their impeachment powers, and you arose and exercised your constitutional right to impeach, putting into motion the impeachment powers insofar as you were concerned, and that came here to this committee, the committee would have the power not to report favorably upon impeachment, just as we do now—we do not have to report favorably upon impeachment——

Mr. MICHENER. No; but if we feel that there is reasonable cause to believe that this judge has been guilty of this thing charged, then we report favorably. But say that we have arrived at the conclusion that there is reasonable cause to believe that this man should be removed from office, then would you say that we are going to adopt the regular method, or are we going to assemble court to try this fellow?

Mr. SUMNERS. I believe that a good deal of discretion would be in this committee in the first instance, and in the House finally. It would probably develop in that direction.

Mr. HEALEY. They could proceed along the old impeachment lines, or could follow the procedure provided for in this bill.

Mr. SUMNERS. What I think would really happen would be that it would work itself out by precedents. I think that we would have the power to go either way, if you want my judgment about it.

Mr. MICHENER. So here this Court, under the Constitution, must convict the judge of a high crime and misdemeanor——

Mr. SUMNERS. I do not think so.

Mr. MICHENER (continuing). In order to remove him. You do not think so?

Mr. SUMNERS. No.

Mr. MICHENER. In other words, that brings it right back to the proposition that it does not require a high crime and misdemeanor to remove a judge from office.

Mr. SUMNERS. I would like to have the statement that I just made considered in connection with the one that I made a few moments ago, that I think, in practice, high crimes and misdemeanors and misbehavior are somewhere in the neighborhood of the same thing. In other words, you could not be guilty of high crimes and misdemeanor and have good behavior.

Mr. TOLAN. Is it not a fact that they have added to that clause, high crimes and misdemeanors, any misconduct on the part of the judge that shocks the conscience of the average citizen?

Mr. SUMNERS. Yes. As I said a moment ago, these impeachment powers, when you observe them in operation as distinguished from looking at the language in the Constitution, have come to embrace something of practically all of the powers of government. Here is a judge who has done things that have brought the administration of justice into disrepute; impeachment charges are preferred. He is prosecuted, and it is the judgment of the Senate that he ought to be off the bench for that reason, so they condemn him and there is no appeal. But, with regard to ourselves, we have to go back to the country every 2 years, and the Senator has to go back to the country every 6 years, and the President goes back every 4 years; but these judges do not have to go anywhere. The people may defeat us or our Houses may expel us. Courts may oust judges for bad behavior, and the Senate may oust them in an impeachment procedure.

Mr. TOLAN. I think that we all agree with your objective. The first impeachment trial that I attended in my life was the one that you prosecuted and, even though the question of whether or not a judge should be removed is a momentous one, I do not think there was one single Senator who was there all the time.

If we were to turn it over to three judges to pass upon the removal of these judges, and a trial should last two weeks, during which one judge attended part of the time and the others part of the time, the people would be up in arms.

Mr. SUMNERS. Yes. In the case before that which we tried, the California case, there were times when there were only three Senators on the floor. That would be the same as arguing a case before the Supreme Court with one-third of a member on the Bench.

Mr. GWYNNE. As I remember the debate at the Constitutional Convention, there was quite a great deal of talk about impeachment.

Mr. SUMNERS. Yes; there was a lot.

Mr. GWYNNE. Is there anything in that debate to indicate that the people who framed the Constitution had in mind the setting up of any court to determine good behavior except the impeachment

procedure that they provided for in the Constitution? In other words, was anything said there to reflect your thought on that?

Mr. SUMNERS. No, sir; there was nothing that I recall. This good behavior limitation upon judicial tenure was transferred apparently as a matter of course from the British law. I may say, however, I do not know of a single commentator on the British Constitution who does not recognize good behavior as a justiciable issue with the right and power to remove a judge by a process of scire facias, I believe they call it, which is a right very similar to our process of quo warranto.

Mr. GWYNNE. But that was done long before we adopted our Constitution, at a time when they had not established impeachment proceedings.

Mr. SUMNERS. Oh, yes; they established impeachment proceedings in the fourteenth century. At the time that we adopted our Constitution, however, impeachment had practically fallen into disuse in England. Aside from the Warren Hastings case, there had been about two cases, I believe, in a century and a quarter, and I do not think that since the adoption of the Constitution there have been more than two or three.

Mr. GWYNNE. Is this not also true, that impeachment had had a long history in England, and when we adopted our Constitution, the procedure had become very firmly established as to exactly what should be done, and as to what the duties of the House of Commons and the House of Lords were, and that therefore we were adopting something that was firmly established?

Mr. SUMNERS. Yes.

Mr. GWYNNE. And we did not seem to adopt any other method.

Mr. SUMNERS. Yes. But impeachment—and that is the constant confusion in the minds of people, and I had to wrestle with it for a long time—impeachment is not an ordinary proceeding. It is not a judicial proceeding in the ordinary sense. It is an extraordinary proceeding in addition to all the ordinary arrangements and powers and procedures of government.

Now, it is true that when they adopted our Constitution, they did not think much about it, apparently. They just took the British arrangement with reference to impeachment, which was their own—they did not borrow it. It was theirs as much on this side of the Atlantic as on the other side. Under the British procedure impeachment was really a criminal procedure, with the possibility of death sentence and confiscation of property. We denied to the Senate power to punish as for crime. We are limited to ouster. The British tried to impeach Warren Hastings. That dragged along 4 or 5 years and nothing happened. That was almost contemporaneous with our Constitution.

Mr. MICHENER. Do you mean this, that the framers of the Constitution had in mind that these officers may be removed by impeachment, but that, however, we are also given the power to remove them in any other way that we see fit?

Mr. SUMNERS. You mean, for bad behavior?

Mr. MICHENER. Do you think that the framers of the Constitution had in mind the fact that we are going to preserve the right of the Senate and of Congress to remove by impeachment, but that they

were at the same time going to grant the power to the Congress to remove by any other method that they might in future years decide?

Mr. SUMNERS. You do not quite mean that. You mean that they want to grant the right to have them removed by procedure in the courts?

Mr. MICHENER. There is nothing said about the courts.

Mr. SUMNERS. The behavior of a judge under the Constitution is a justiciable issue. They put it into the Constitution. They recognized it as a justiciable issue.

Mr. MICHENER. Was it not their idea that they were not going to have these judges harassed or removed except through impeachment, and first you have to go over the hurdle in the House, by a majority vote or two-thirds——

Mr. SUMNERS. No; I do not think that.

Mr. MICHENER. And then you have to go to the Senate, and there they have to meet the people in trial?

Mr. SUMNERS. I do not think they had any notion at all of the exclusive duty to do that. If that had been the purpose there would have been no necessity to put in the Constitution the language we are considering. If it had been left out then impeachment would probably have been the only remedy. Its inclusion gives another unless they be in fact dead words in the Constitution.

Mr. GWYNNE. I think that the Constitution put upon the judges the obligation of good behavior—we agree to that—and set up machinery for determining it through this impeachment proceeding.

Now, I understand that it is a general rule of construction that where an instrument creates a certain obligation on any individual, and sets up the machinery for determining whether or not you have kept the obligation, that is deemed to be the exclusive machinery. Is that not true? Is that not a general rule of statutory construction?

Mr. SUMNERS. That is right. If you had stated the proper premise, your conclusion would be sound, but I just have to keep hammering at it, that impeachment under our system and under the British system is disassociated from all ordinary rights and remedies and has no relationship to them. You see what I mean. It takes a little while to get that into our heads, that impeachment is one of those remarkable powers of Government suited under old conditions to great offenders, but which, as I say, has fallen into disuse in England, and will fall into disuse here because it is too cumbersome.

The Senate does not have the time; besides it is not by its structure or its duties a court. The reason assigned for the origin of impeachments is that there were offenders too powerful to be controlled by the ordinary processes of Government. That was the reason. Burke makes a very clear statement in his argument in the *Warren Hastings impeachment case*. When you examine the commentators on the British Constitution, you will see that they all recognize impeachment as not an ordinary proceeding, but as a proceeding to be called into action in extraordinary times and conditions. It is the reserve power of the people to deal in some extraordinary conditions with officers of power. That is the whole place and philosophy of the impeachment power in our Constitution as it is in the British Constitution from which it was transferred.

But it is too cumbersome, and here we are using it to oust a Federal judge, calling into use the machinery of the whole Senate to

sit in judgment—and they won't sit in judgment. If we were trying a President, or if we were trying the Chief Justice of the Supreme Court or some such officer as that, the Senate would sit there day in and day out during the impeachment trial. As a matter of fact, under the plan and philosophy of government, that is the only time when the impeachment powers ought to be exercised. You must consider the offense, and the respondent's power and importance. There must be a logical relationship between the importance and power of the respondent and the taking up of the time of the whole Senate before which you try him. It is so ridiculous that it would be funny if we did not have to laugh at ourselves.

Gentlemen, it is rather fortunate that we hold to some of these things a long time. Stability is essential, but there is nothing more absurd than the picture of a whole Senate sitting for 10 days to determine whether or not a district judge ought to be removed. Besides, they do not do it as well as the court would. They have something else to do. Their business is legislative, not judicial, and they do not have the judicial approach.

Please remember, in the first place, that this is a justiciable issue. If you take the Constitution and strike out the language about good behavior and then read it, you would still see that the judge would be subject to impeachment. You see, we are constantly confusing the impeachment powers with the constitutional right to initiate a judicial proceeding. I do not say it in any criticism, but you get this question of impeachment out of your head and then turn around and it is back in again.

Strike out the words "good behavior" in article III, and you know that the judge would be subject to the impeachment powers under the last provision of article II. Then I believe you will agree that that language in your Constitution "during good behavior", by every rule of construction, must be recognized as vital language. Is that right? Does anybody know of any rule of construction under which you would say that these words do not mean something?

Then you write those words back in your Constitution. You see, they do not add anything to the power to impeach, because you had the power to impeach without those words. All the impeachment power you have with them, you have without them. Then how are you going to vitalize those words, and keep them from being dead words in the Constitution except by recognizing them as making the conduct of a judge a justiciable issue?

Mr. TOLAN. Under that clause of the Constitution that the President, Vice President, and all civil officers may be impeached for high crimes and misdemeanors, it goes through my mind that there is not anything said about judicial officers. It says civil officers, not civil and judicial officers, but it is generally interpreted that the judges come within that language.

Mr. SUMNERS. That is right.

Mr. TOLAN. So, if I get your idea, the judges hold office during good behavior, and your idea of this legislation is that there is no machinery set up in the Constitution to try men for misbehavior, and you feel that Congress has a right to adopt legislation creating the machinery, the method——

Mr. SUMNERS. To try the issue of good behavior.

Mr. TOLAN. Yes; and you do not tie that into the impeachment provisions?

Mr. SUMNERS. No; that is the confusion that gets into the mind of nearly every American lawyer that I know of.

Mr. TOLAN. Because that has been the practice.

Mr. SUMNERS. I know, but if you keep looking at it a little while, you see the distinction.

Mr. MICHENER. That gets back to where I was a while ago, that bad behavior is not a high crime and misdemeanor.

Mr. SUMNERS. I will put it this way. If they mean the same thing, it is a coincidence. If the offense on which you impeach and the offense on which you can oust are the same, it is coincidence. There is no attempt in the good-behavior provision to mean the same thing as meant in the impeachment provision.

Mr. MICHENER. You want to be able to remove a judge for less cause than you could impeach?

Mr. SUMNERS. I would not say less or more.

Mr. MICHENER. There would have to be a distinction as to the conduct there, would there not?

Mr. SUMNERS. What I am trying to get at for the moment is the constitutional power to set up this court. We separate the question of whether it is practical or whether we favor it from the question of the constitutional power to do it, and I do not believe we can get a better method of approach in determining the Constitution power than to strike those words "good behavior" out of the Constitution. Do it literally and then see whether or not you have the power to impeach for the same things that you would have the power to impeach if "good behavior" were in there. If you have, then "good behavior" does not add to the impeachment powers. The next question is, What does it add? What does it do? Either a justiciable issue or nothing.

Mr. MICHENER. Let us take the *Archbald case*, with which I was familiar, and this last case, where you convicted; there was not enough in either one of those cases, leaving out the "good behavior" to impeach the man, because the Senate held that, taking each specific act that he had committed, standing as an act, he was not guilty of any high crime or misdemeanor, but they said that if you put these little acts together that are inconsistent with good behavior, you get enough to make what amounts to a high crime and misdemeanor. That was the only theory on which the blanket clause was ever used, as you recall, when we first used it here, and they sustained that just recently in the court.

Doesn't that just go against the thing that you are talking about?

Mr. SUMNERS. Not at all. Let us take a State statute. Suppose that in your State statute you have the general provision for impeachment. Then you have a provision in your State statute that the treasurer may be ousted for embezzlement.

Mr. TOLAN. We had that very thing in California.

Mr. SUMNERS. That is a good illustration. He may be ousted for embezzlement, and you have an impeachment provision in there, too. That gets down to what I am talking about now, the fact that you could impeach him for embezzlement would not prevent you from ousting him in a court trial for embezzlement, and the fact that you may impeach a man for bad behavior would not prevent you from ousting him for bad behavior.

I think that that is about as clear a picture as I can give of what I have in mind. I will tell you that this impeachment thing is one of the most interesting and yet one of the most difficult to get straightened out in our mind.

Mr. MICHENER. And one other is the money question. You study the money question, and you get some notions about it which later you find you have to change.

Mr. HEALEY. In other words, your position is that the Constitution says that a judge may hold office during good behavior, and that stands alone, without being amplified at all by any other provisions of the Constitution.

Mr. SUMNERS. That is right.

Mr. HEALEY. The question is, what authority is to determine whether or not his conduct on the bench has amounted to bad behavior?

Mr. SUMNERS. By the process of elimination, you get to the court as the only possible authority that can determine that issue.

Mr. HEALEY. Now, you do not think that the next article, which provides that a judge may be impeached for high crimes and misdemeanors, and sets up the machinery for that impeachment, refers back to the previous article specifying that he may hold office during good behavior?

Mr. SUMNERS. The impeachment happens to be in first, but it does not make any difference. There is no connection.

Mr. MICHENER. You had that in mind when you drew this bill, because I notice you provide in the bill that there shall be no punishment excepting ouster from office.

Mr. SUMNERS. That is right.

Mr. MICHENER. And that was always the theory here, that impeachment was nothing but an ouster, and the only thing that you could do to a man was to put him out of office——

Mr. SUMNERS. That is what I think.

Mr. MICHENER (continuing). And the only way you could do it was by impeachment. That is my difficulty.

Mr. SUMNERS. Suppose you come right back to the proposition about your treasurer, which puts the picture clearly. Suppose you provide, as they do in California, that if the treasurer is guilty of embezzlement, you may oust him by an ouster suit, and you have your impeachment provision also, then you could oust him by impeachment or by your suit. They do not mix up. They are just as separate from each other as they can be.

Mr. REED. In considering this bill, suppose we strike out, as you suggest, every provision of the Constitution that relates to impeachment and leave only this section 1 of article III that provides for misbehavior.

Mr. SUMNERS. That is a pretty good way to put it.

Mr. REED (interposing). Then there is nothing in the Constitution——

Mr. SUMNERS (continuing). You are as smart as you can be.

Mr. REED. We consider this bill and say that Congress has the power to set up a judicial tribunal to try that issue, but we are adding into the bill a judicial power in Congress to act as a grand jury to initiate the proceeding. Where in the Constitution would

you find that, in the place of section 1 of article III, which says that the judicial power of the United States shall be vested in the Supreme Court?

Mr. SUMNERS. That is interesting, but in your first remark you have clarified this situation that I have been trying to put over. You have two propositions: First, suppose that there were no impeachment provision, then certainly the behavior of a judge under the provision as to good behavior could be tried in a court. He could be ousted by its judgment. As to the other proposition which is not without difficulty, there is no inhibition in the Constitution against Congress putting this power in the persons who constitute the House to do this preliminary work. It could not clothe them with the power to adjudicate this question. It would be questionable whether Congress could clothe them with the power to present this matter to the court.

Mr. REED. In other words, in setting up this tribunal to try this case, you are giving the membership of the House of Representatives the power to initiate the proceedings.

Mr. SUMNERS. No; not exactly; but we make a preliminary examination and suggestion to the Attorney General. He could not proceed without it. We make the suggestion to the Attorney General, and he has to file his suit. The court hears the testimony and decides. We could provide by law, I think, without any sort of doubt, that any agency of government, any one of these departments here, would have the right to suggest to the Attorney General the initiation of a prosecution. That is exactly what does happen. It is a civil suit.

Mr. GWYNNE. Do they not have to submit something like this is England, in connection with their judges?

Mr. SUMNERS. No, sir. They recognize that they could do it, but they have had a very interesting experience with their judges over there. In the first place, you know that they pick the best lawyers they have. They are not political appointees. They are removed by joint address. I do not think they have impeached a judge there since we organized our Government, with probably one exception.

Mr. TOLAN. That makes you the pioneer, does it not, in the United States?

Mr. SUMNERS. Maybe so. I do not recognize this as something to be hastily acted upon. I am perfectly willing to stand sponsor for it. I know the behavior of judges is justiciable both by its nature and under this provision of our Constitution, and I know that we cannot continue this procedure of impeachment as the only remedy. There is nothing more absurd than for a government to have that sort of way of doing business.

Mr. TOLAN. To me the most persuasive thing said this morning was—if we forget about the impeachment proceeding and try the judge for good behavior, could you do anything about it?

Mr. SUMNERS. You know, I have been working hard to put this thing over; and I have not been able to do it, but Mr. Reed put his finger right on it.

Mr. TOLAN. But you mentioned it before he did.

Mr. SUMNERS. Not like he did. I have been trying for some time to find some expression which would stick, but could not; and he

said: "Suppose that you did not have the impeachment provision, and you looked down there and saw the good-behavior provision, could there be anything done about it if the judge did not behave himself?"

Mr. GWYNNE. But does that not bring us back to this, that that would be true if there was nothing in the Constitution, but the Constitution does say something about it that affects the determination of good behavior.

Mr. REED. No; high crimes and misdemeanors.

Mr. GWYNNE. It seems to me that high crimes and misdemeanors is equivalent to bad conduct.

Mr. SUMNERS. But the answer to that is that neither this Government nor England depended upon its impeachment powers to deal with their ordinary processes of governmental control or administration. It is a thing that is just thrown in there on top of every other arrangement. The machinery and processes are, generally speaking, complete without it. There is not anything to indicate that in the Government of England or America we were depending upon the impeachment powers to keep things moving smoothly. It was done to handle something most extraordinary, such as when they went to the highest tribunal to deal with a person who was above the power of law, generally speaking. That is the explanation. And they did not use it. At first they used the power to oust the ministers of the King, but when the ministers of the King became subject to the control of Parliament and the judges to the joint address, the power began to fall into disuse.

Of course, at first they prosecuted a lot of people, but it was only great men, whom they did not think the court would try. But these judges are not such men. These are men who are thought to have violated a condition of their contract with the people. How is it going to be settled? Like all other such issues are settled, by a trial in a court.

Mr. TOLAN. The other thing that occurred to me was this: Was it ever in the minds of the framers of the Constitution that when this country grew—and we have now 155 Federal judges—we should stop the work of the Senate, the highest legislative body of the United States, for days and weeks, to try a judge?

Mr. SUMNERS. I do not believe anybody can examine the Constitution, the whole philosophy of it, and conclude that this power of impeachment was included to keep ordinary officers straightened out. It is a power rarely to be used, extraordinary in its burdens and difficulties, cumbersome in its operation. It has just been that way. We have never stopped to examine it; but if we ever do stop to examine it, and just keep on looking at it for awhile, we will agree that there is nothing more absurd and wonder why we tolerated it so long.

Mr. HEALEY. May I ask you a question? I do not want to interrupt you.

Mr. SUMNERS. I am through.

Mr. HEALEY. In section 4 you have excluded from the provisions of this act the judges of the United States Court of Appeals for the District of Columbia, the judges of the circuit courts of appeals, and the Justices of the Supreme Court of the United States.

Mr. SUMNERS. That is right. I will tell you why I did that. In the first place, this is obviously an experiment—no doubt about that—and the number of those judges excepted is sufficiently small, and their national importance is sufficiently great, that for the time being, at least, there might probably be an excuse for taking the time of the Senate to try them; but with these one hundred and eighty-odd people around the country, there is no excuse for it.

Mr. MICHENER. You do not think that there would be any constitutional difficulty about differentiating between the removal of a district judge and a circuit judge when, as a matter of fact, under the law the district judge functions a part of the time as a circuit judge?

Mr. SUMNERS. I do not think so. I do not think that there is any requirement for uniformity that compels the embracing of all classes of public officials belonging to the same branch of the Government.

Mr. GWYNNE. One writer on this subject suggested that these cases might not be tried by the whole membership of the Senate, but by a committee of the Senate, who would report to the Senate, and that in that way you could obviate a lot of difficulty.

Mr. SUMNERS. I think that I had the honor of making that suggestion myself. I tried to get them to do it.

Of course, a committee would act as master. The Supreme Court of the United States does not hear witnesses in those matters where they have original jurisdiction. They could work that out over there in the Senate. But, of course, it would be better to have the judgment rendered by the body that hears the evidence.

Mr. GWYNNE. In other words, the answer to this writer's suggestion is that it cannot be put into operation? Is that it?

Mr. SUMNERS. Sir?

Mr. GWYNNE. I take it that the answer to this writer's suggestion that the case be handled by a committee cannot be put into operation?

Mr. SUMNERS. The Senate will have to do something like that unless we establish something like that which is proposed in this bill. I understand that Senators object to rendering judgment when they have not heard any of the testimony, even though a small committee has done it. Sooner or later, necessity will compel the Senate to insist that the trial of an ouster proceeding against a Federal district judge shall be in a court and not in the Senate.

Mr. HEALEY. There is one other question that I would like to ask you. In line 15, on page 2, you specify that the trial shall be without a jury.

Mr. SUMNERS. Yes.

Mr. HEALEY. Do you think that we will run into any constitutional question there?

Mr. SUMNERS. No; no constitutional question.

Mr. MICHENER. There is no punishment attached, just removal.

Mr. TOLAN. I think that has been upheld in the different States.

Mr. SUMNERS. Gentlemen, you certainly have been very kind to take all this time to listen to me on the eve of the celebration of Easter.

Mr. HEALEY. I think that the committee ought to hold these hearings open, and to convene from time to time in the event that other

persons may want to present arguments to the committee, because the chairman and the other members of the committee, I am sure, recognize that this is very important and far-reaching legislation, and we want to afford an opportunity to all who can help us to be heard.

Mr. SUMNERS. You won't find anybody, at least, not many, who know anything about it. That is one of the most interesting things. I would just as soon risk your judgment upon it. The lawyers of this country have never thought about this thing, and I never would have thought about it if I had not been associated with impeachment matters for a long time.

Mr. HEALEY. We have another member of the committee, Mr. Hobbs, who has given this matter a good deal of study, and I will ask him, at some later time, if he would like either to put a statement in the record or to appear before the committee and present his argument on this bill.

Mr. HOBBS. I will be glad to do anything that the committee wishes.

Mr. MICHENER. Not being a member of the subcommittee, I want to thank the committee for the privilege of being here.

Mr. HEALEY. We appreciate your coming, and your assistance.

Mr. MICHENER. May I be advised when further hearings are held?

Mr. SUMNERS. I am much obliged to you for coming here.

Mr. HEALEY. Thank you very much, Judge.

(Thereupon, at 12:15 p. m., the subcommittee adjourned, subject to the further call of the chairman of the subcommittee.)

Commonwealth of Massachusetts

Administrative Committee of District Courts

August 2, 1937.

TO THE JUSTICES, CLERKS AND PROBATION OFFICERS OF THE DISTRICT COURTS:

In accordance with our custom, we have delayed the issuance of our regular circular letter until the legislative enactments were obtainable in final form. We now refer to all such of particular importance to our courts. While your Committee initiated some of this legislation, it was through the courtesy of the Judicial Council that recommendations therefor were placed before the legislature.

ACTS OF 1937.

Chapter 44. This Act, which is effective on September 1st of the current year and applies only in case of actions commenced thereafter, provides that a plaintiff in an action of tort arising out of the operation of a motor vehicle which has been removed to the Superior Court under Section 102A of Chap. 231 of the General Laws shall recover no costs unless final judgment is entered for more than one hundred dollars as damages. There are certain limitations as to this restriction which need not be enumerated.

Chapter 59. This Act approved February 26, 1937, permits destruction of complaints, warrants, documents and other papers in criminal cases and writs, declarations, petitions and other papers in civil causes filed in our courts as completed business for not less than twenty years. Dockets and record books must be retained.

Chapter 99. This Act approved March 11, 1937, changes the provisions of section 37 of chapter 266 by striking out the word "ten" and inserting in lieu thereof the word "two" immediately before the word "days" as found toward the end of the section. It will be noted that this amendment sharply restricts the period of time within which the maker or drawer of a fraudulent check, draft or order may pay the holder the amount due thereon after notice that the same has not been paid by the drawee.

Chapter 117. This Act approved March 19, 1937, extends the power of the Registrar of Motor Vehicles by enabling him to rescind at any time the revocation of a license revoked because of a conviction of operating a motor vehicle upon any way or in any place to which the public has a right of access, negligently so that the lives or safety of the public might be endangered.

Chapter 133. This Act which took effect on July 1st of the current year changes the period of time, for the removal of a motor tort case, within which the plaintiff may file a claim of trial by the Superior Court. The present statute reads "not less than two nor more than four days after" such entry. As amended the statute will read "not more than four days" after the entry.

Chapter 188. This Act which was approved April 9, 1937, reduces the entry fee in supplemental proceedings from three dollars to one dollar.

Chapter 208. This Act, which bears an emergency preamble and was approved April 16, 1937, makes uniform the law as to extra-territorial arrest on fresh pursuit. Under section 10B thereof it is required that a person arrested by an officer of another state shall without unnecessary delay be taken before a Justice, Associate Justice or Special Justice of a court of record in the county in which the arrest was made, who shall conduct a hearing for the purpose of determining the lawfulness of the arrest. If after such hearing it is

determined that the arrest was lawful, the magistrate shall commit the person arrested to await for a reasonable time the issuance of a rendition warrant from the Governor of the state from which he fled. If it shall be determined that the arrest was unlawful, the person arrested must be discharged.

Chapter 210. This Act approved April 16, 1937, makes uniform the law securing the attendance of witnesses from without a state in criminal proceedings. It would appear that some forms may be required or at least procedure policy be indicated. This matter will have the attention of your committee in collaboration with the other courts affected.

Chapter 230. This Act which takes effect on September 1st of the current year authorizes the issuance of a summons instead of a warrant upon a complaint for violation of any provision of paragraph (2) (a) of section 24 of Chap. 90 of the General Laws as appearing in section 1 of Chap. 434 of the Acts of 1936. This amendment will clear up a vexatious situation involving the more serious motor vehicle offences other than driving under the influence of liquor.

Chapter 250. This Act which takes effect on September 1st next at last changes the penalty for unlawful carrying certain dangerous weapons so that jurisdiction is again restored to the District Courts. The penalty as found in Chap. 227 of the Acts of 1936 "ten years in the state prison or for not more than two and one-half years in a jail or house of correction, except that if the court finds that the defendant has not been previously convicted of a felony, he may be punished by a fine of not more than fifty dollars" is stricken out and in lieu thereof is inserted the following "five years in the state prison or for not less than six months nor more than two and one-half years in a jail or house of correction, except that if the court finds that the defendant has not been previously convicted of a felony, he may be punished by a fine of not more than fifty dollars or by imprisonment for not more than two and one-half years in a jail or house of correction."

Chapter 251. This Act which is effective on September 1st of the current year completely changes the statutory provisions with reference to costs in criminal proceedings. Section 6 of chapter 280 is stricken out and in lieu thereof there is inserted the following "Costs shall not be imposed by the Court or Justice as a penalty or part penalty for a crime provided that the Court or Justice may as a condition of the dismissal or filing of the complaint or indictment or as a term of probation order the defendant to pay the reasonable and actual expenses of the prosecution as determined by it or him." This Act when effective should standardize the subject matter. Heretofore a great majority of the courts have not imposed costs in criminal proceedings. This was partly due to the fact that the statutes did not permit such action except upon certification by the Justice that the maximum penalty in his opinion was inadequate. The determination of the costs was extremely difficult under the old wording.

A question has been raised as to how the words "reasonable and actual expenses of the prosecution" shall be interpreted. It is our understanding that actual expenses only, such as witness fees, telephone or telegraph charges, can be included in the costs. The word "reasonable" is intended to limit the breadth of this right so that there shall be no attempt to include costs which cannot properly be said to grow out of the prosecution. It might possibly also be used to limit the amount of the actual costs in case they should be so excessive as to be unreasonable in their burden upon the defendant.

Chapter 295. This Act which was approved May 12, 1937 regulates the attachment of motor vehicles by requiring that written consent to such attachment on mesne process in an action of contract must be endorsed on the writ and signed

by a Justice of the court wherein such action is commenced. This Act contains a sentence which is important, namely, "Costs in any action in which such a motor vehicle has been attached shall be in the discretion of the court". Interpreting this language and giving to the words their ordinary meaning it would seem that all costs in such actions must be approved by the Court including what are known as statutory costs.

Your Committee recommends the use of the following form of consent to be printed and attached as a rider to the writ:

COMMONWEALTH OF MASSACHUSETTS

_____ SS. _____

Court
FOR CIVIL BUSINESS.

_____ 19____

In the action of contract of _____ vs _____ wherein the writ is dated _____ 19____, and is returnable to this court _____ 19_____, permission to attach the motor vehicle, duly registered, of the said defendant is hereby requested, said attachment being necessary and reasonable as security for the judgment the plaintiff expects to recover.

_____
ATTORNEY FOR PLAINTIFF

The above application granted / denied

_____ 19____

Consent is hereby given to attach the motor vehicle of the defendant, duly registered, if said attachment is authorized by law.

Chap. 295,
Acts of 1937.

_____
JUSTICE

Chapter 301. This Act which is effective on September 1st of the current year enlarges the jurisdiction of District Courts for criminal business. We regard it as a valuable addition to our statutory jurisdiction on that side of the court. In effect, it gives us jurisdiction concurrent with the Superior Court of all violations of by-laws, orders, ordinances, rules and regulations made by cities, towns and public officers, of misdemeanors except conspiracies and libels, and all felonies for which a penalty of fine or imprisonment in a jail or house of correction is provided. The important part is of course the extension of the jurisdiction over felonies. After September 1st we will have jurisdiction regardless of the length of the state prison sentence provided there is an alternative penalty of fine or imprisonment in a jail or house of correction. A considerable number of offences will thus be brought within our jurisdiction.

There follows a list which is informing but not intended to be all inclusive.

	Chapter	Section
Accessory after the fact	274	4
Accusing another of crime with intent to extort money	265	25
Aiding escape of person charged with felony	265	15
Assault with intent to maim	265	15
Assault with intent to rape	265	24
Attempt to commit murder by poisoning etc.	265	16

Bank officer, embezzlement of funds by	1934	c. 270
Banking, certain crimes as to	266	53A
Bill of lading, False	266	110
Blackmail	265	25
Bombshell, exploding in building etc.	266	102
Bribery of police officer	268	7
Burglarious instrument possession	266	49
Burglarious instrument machine for making	266	49
Burning ship or vessel	266	109
Common cheat	266	76
Common thief	266	40
Confining-kidnapping	265	26
Counterfeit money in possession	267	18
Counterfeit tools, papers etc.	267	13
County officer, embezzlement by	266	51
Deed, uttering forged	267	5
Duel (No homicide)	265	6
Dwelling destroying by explosive	266	1
Embezzlement by bank officer	266	52
Embezzlement by liquidating agent or receiver	266	55
Embezzlement by trustee	266	57
Embezzlement by city officer	266	51
Embezzlement by employee state treasury	266	50
Escape, aiding etc.	1934	344
Explosive destroying dwelling etc.	266	101
False pretense	266	31
Fight by arrangement	265	9
Fire apparatus injurying	266	12
Fraudulent stock issue	266	66
Gift to police officer	268	8A
Gross fraud at common law	266	76
House of Correction, Escape from aiding	268	15
Incest	272	17
Infernal machine possession	266	102A
Larceny of automobile	266	28
Manslaughter	265	13
Mayhem	265	14
Miscarriage, woman living, procuring or aiding in	272	19
Motorcycle - concealing thief	266	28
Murder, assault to commit - not armed	265	15
Murder, attempt to commit by drowning, poisoning or strangling	265	16
Obtaining signature under false pretenses	266	3
Public officer accepting gifts	268	8
Public record, forgery of	267	1
Publishing false statements	266	94

Railroad obstruction of track	160	226
Railway car or railway explosives on	266	102
Seal of Land Court, forgery	267	3
Ship destroying	266	109
Ship false invoice	266	110
Signature procured by false pretenses	266	31
Stock unauthorized issue	266	65
Threats to extract money etc.	265 (1932-211)	25
Uttering and forgery	267	5
Weapon, assault with dangerous	1937	c. 250

Chapter 304. This Act which is effective October 1st makes uniform the procedure of interstate rendition. Such forms if any as may be needed or procedural policies requiring adoption will have to be considered with the officials of the Superior Court and the Municipal Court of the City of Boston, if it seems desirable. Further information with respect to this matter will be sent to the courts at a later date.

Chapter 307. This Act which is already in effect, having an emergency preamble attached thereto, provides for the entry of this Commonwealth into compacts with any of the United States for mutual helpfulness in relation to persons convicted of crimes or offences, who are on probation or parole.

The Governor of each contracting state may designate an officer who acting jointly with like officers of other contracting states if and when appointed shall promulgate such rules and regulations as may be deemed necessary to more effectively carry out the terms of the compact.

Chapter 308. This Act approved May 18th is of similar import to that of Chapter 295 hereinbefore referred to in that the consent of the court is required before a keeper of personal property which has been attached may be appointed. There is also a similar provision to that in Chapter 295 with reference to costs in such actions, and the following form of consent as a rider to the writ is recommended:

COMMONWEALTH OF MASSACHUSETTS,

_____ SS. _____ COURT

FOR CIVIL BUSINESS

_____ 19____

In the action of contract—tort—of _____

vs _____ wherein the writ is dated _____ 19____

permission to appoint a keeper over the property of the defendant

_____ at _____ which has been
(Description of Property)

attached, is hereby requested, said attachment being necessary as security for the judgment the plaintiff expects to recover.

_____

ATTORNEY FOR PLAINTIFF

The above application granted / denied.

_____ 19____

Permission is hereby granted to appoint a keeper of the personal property attached if said attachment is authorized by law.

Chap. 308
Acts of 1937

_____

JUSTICE

We are advised that the Secretary of State holds this Act takes effect in ninety days but as it has to do with the power of courts it seems to us not subject to referendum and thus being effective in thirty days is already in force. If our view is correct, clerks will have to be careful as to the costs in any actions brought subsequent to the expiration of the thirty days.

Chapter 310. This Act approved May 18th makes more effective the procedure for the collection of small claims. It strikes out in the 11th line of section 22 of chapter 218 of the General Laws the period and the word "the" and inserts in place thereof the following "and authority in the court in its discretion after proper inquiry to order payment to the prevailing party of the amount found due on or before a date stated or by instalments, to modify, extend or vacate such order and in its discretion to enforce such order by contempt proceedings substantially in the same manner provided in chapter 224 and to provide therefor in the rules for the procedure."

Steps are being taken to prepare the rules called for and any necessary changes in docket cards. As soon as prepared they will be forwarded to the Presiding Justices together with certain recommendations for other changes which were presented at the time of the meeting of the Justices' Association for approval. When approved by a majority of the Presiding Justices they will become effective.

Chapter 311. This Act approved May 18th extends the right to withdraw appeals in criminal cases by appropriate amendment so that a defendant may not only withdraw his appeal at any time before the next sitting of the Superior Court for criminal business but also at any time thereafter if no action shall have been taken by the Superior Court except continuance. This extension right ought to be of considerable value in those parts of the state where sittings of the Superior Court for ciminal business are infrequent.

Chapter 387. This Act was approved May 28, 1937. It is an Act relative to service of process on certain defendants in motor vehicle accident cases. The only part thereof in which the courts are directly interested is the provision giving them power to continue an action if necessary to afford the defendant reasonable opportunity to defend. This power is found in paragraph 3.

Chapter 409. This Act which is effective September 1st of the current year deals with the retirement or resignation of members of the judiciary. It is hardly necessary to analyze it in detail.

Chapter 439. This Act approved May 29th should be studied as to section 1.

COMPENSATION OF PROBATION OFFICERS.

By the terms of chapter 186 which was approved on April 9th last, the salaries of the probation officers in the Suffolk County Distirct Courts and the Boston Juvenile Court are subject to the approval of your Committee. This was an unsought responsibility. Since the Act became effective in thirty days, your Committee has already been required to pass upon salaries established by most of the courts affected. We have visited all of the courts in which any change has been sought, met and conferred with the probation officers and examined their records. We have also made inquiry of the manner and type of work done by each of them, the volume of the case load, the money collections and the character of the population served. In order that there may be no misunderstanding as to our decisions, we report the names of the courts, the probation officers whom we designate by number rather than by name, the salary heretofore enjoyed, the amount requested and the compensation approved by your Committee.

We feel it proper to state we have found considerable diversity in type of personnel and practice. There should be entire devotion to the spirit of probation, loyalty to the Justice, prompt reports to the Probation Commission and co-operation with it and an economical administration of their respective offices.

SALARIES.

COURT:			PRESENT:	REQUESTED:		APPROVED:
Roxbury:	8 men	1	$3500	$5500		$4300
		1	3000	4500		3400
		6	2800	4000	5	3200
					1	3100
	2 women		$2500	$3500		$2800
			2500	3500		2800
South Boston:	3 men		$2500	$3500		$3100
			2000	2750		2300
			1700	2500		1800
	1 woman		2000	2500		2200
East Boston:	2 men		$2900	$3500		$3300
West Roxbury:	2 men		$2500	$3000		$2900
			$2500	3000		2800
Brighton:	1 man		$2500	$2600		$2600
	1 woman		1500	1700		1700
Boston Juvenile:	3 men		$2900	$3500		$3300
			2600	2900		2900
			2500	2750		2700
	1 woman		2300	2750		2600

FORMS FOR USE IN JUVENILE CASES.

Your committee sent to each court a set of forms prepared by a committee of the Justices' Association with the suggestion they be adopted forthwith. We have no way of knowing to what extent this suggestion met with approval except that we received a few affirmative replies. As we stated in the letter of transmissal, these forms have been approved by certain persons who are active in promoting legislation to establish separate Juvenile courts throughout the state. We are anxious to remove any possible grounds for criticism of the present practice. In addition thereto we feel that the new forms more nearly conform to the intent of the law and that there is benefit in uniformity. We sincerely trust that all of the courts which have not heretofore taken such action will adopt the new forms even if this may mean the discarding of the supply of the old ones now on hand.

NOLO CONTENDERE AND DRIVING A MOTOR VEHICLE UNDER THE INFLUENCE OF LIQUOR

Your Committee has noted a number of instances of late where, at least according to press reports, defendants have been permitted to plead nolo contendere to a complaint charging driving a motor vehicle under the influence of intoxicating liquor. There is no question but the plea of nolo contendere is at times properly useable and should be accepted by the court. It is particularly applicable in minor offences where the defendant has had a previously good record since it permits the court to inflict punishment while the offender remains free from a criminal record. In our opinion however the nolo contendere

plea should not be accepted when applied to the major offences. The operation of a motor vehicle while under the influence of liquor is a serious offence and there is no excuse except under the rarest of circumstances for accepting a nolo contendere plea in such cases. This is particularly true in view of the fact that the legislature last year removed from the statutes the mandatory jail sentence for second offenders.

MOTIONS TO CONSOLIDATE ACTIONS.

The Clerks should bear in mind that when motions for the consolidation and trial together of actions are filed, the Rule requires that the hour as well as the date of filing should be noted. It is extremely important that this be done for a question may arise as to which Appellate Division shall act upon the motions.

Will the clerks please inform the other officials in their offices as to this requirement.

REORGANIZATION OF DISTRICT COURT SYSTEM.

The Judiciary Committee at the recently concluded session of the legislature had before it for consideration the reports of the Special Commission of last year and of the Judicial Council in addition to many bills filed by private individuals. We were impressed with the spirit of genuine interest in the problem of a reorganized District Court system and the attention paid to the speakers at the executive session. Every member of the committee seemed to recognize the complexity of the problem, the inadequacy of salaries paid to Presiding Justice, increasingly unable to conduct a private practice as heretofore, the need for some compensating financial provision for Special Justices to meet the changed conditions due to the latest promulgated rule affecting their practice on the civil side in their own courts, and the necessity of reducing the number of magistrates while building up the volume of the work of as many courts as possible to require full time service. The problem proved too complex to solve in the limited time available. Consequently and we think very wisely the whole subject was referred to the Committee for consideration as a commission. There can now be study and conference - unhindered by a multiplicity of other questions and demands on time. We assume this Commission will shortly organize and later arrange for hearings.

At a recent meeting of the Justices' Association, a plan which had been prepared by our Committee was referred to and a motion that it be published by us was carried. At that meeting our representative stated that it was possible we could publish this plan in the next circular letter but the matter would have to be further considered by us.

This plan was prepared solely with the idea that if the original plan then before the Judiciary Committee should not prove satisfactory there might be some compromise upon which all parties could agree and thus there be constructive action.

At a recent meeting of the special committee consisting of five Justice and five Special Justices appointed by the President of the Justices' Association in accordance with a vote directing him so to do, which committee we understand is to represent all of the parties in interest in conferences with the Judiciary Committee sitting as a commission, the wisdom of the publication of this plan was discussed. It was felt that our committee should withhold such publication. Accordingly we do not at this time publish it. However we feel we do not wish to dismiss the subject without a word of warning and advice.

No perfect system can be devised to cover the entire state and include seventy-two differing courts. There will be some injustices in the grouping of courts and the fixing of compensation. But if we begin to demand that this or that court be made an exception, that the compensation of the different groups be equalized, that other officials be included in any increase in compensation, we will find ourselves just where we are now. We sincerely trust when a plan is formulated by the Committee of Justices and Special Justices and after conferences with the officers of the Justices' Association and with our Committee, every one will unite in presenting it to the Commission.

If just requests for increased salaries are made by other officials they can be considered independently and acted upon by the Commission if within the scope of their authority.

STATISTICAL RETURNS BY THE CLERKS.

Blanks for use in compiling the statistical work of the courts in the same form as last year will be sent to the clerks shortly after the first of September. We appreciate the promptness with which the returns were made last year and ask for the same co-operation this year.

Philip S. Parker
Nathaniel N. Jones
Charles L. Hibbard

Did the Act of Congress of March 1, 1937, "create" or did it "increase" the "emoluments" of any office within the meaning of Section 6 of Article I of the Constitution, so as to render members of the present Congress, which enacted that Act, ineligible during their current terms for appointment as Justices of the Supreme Court?

By **ANDREW F. BURKE**, *of the San Francisco Bar.*

Prepared in June, 1937, printed in The Recorder, San Francisco, August 16th and 17th, 1937, and reprinted August 19, 1937, in 81 Cong. Rec. (Appendix) 12026-27.

By Act of March 1, 1937, Congress extended to Justices of the Supreme Court the privilege theretofore granted to Federal Judges, other than Justices of the Supreme Court, viz., to "retire" from active service (without "resigning" their offices), with the right to receive, during the balance of their lives, the compensation which they were receiving at retirement.

A question has arisen whether any member of the present Congress, which enacted the Act of March 1, 1937, will, during his current term of office, be eligible to appointment as Justice of the Supreme Court in view of Section 6 of Article I of the Constitution, which reads, in part, as follows:

> "No Senator or Representative shall, during the time for which he was elected, be appointed to any civil office under the authority of the United States, which shall have been created, or the emoluments whereof shall have been increased during such time; . . ."

Two grounds are asserted against the eligibility of members of the present Congress during their present terms. They are:

(1) That the Act of March 1, 1937, increased the "emoluments" of the office of Justice of the Supreme Court, in providing for a retirement allowance for retired Justices; and

(2) That the Act of March 1, 1937, in providing for the appointment of a so-called "successor" to a retiring Justice of the Supreme Court "created" a new office, inasmuch as a retiring Justice does not vacate (but, on the contrary, continues in) his office, so that his so-called "successor" is not a successor at all, inasmuch as he does not fill a vacancy in an old office, the office of the retiring Justice, but in fact fills a new office.

It is to be noted that the ineligibility thus asserted against members of the present Congress will not extend beyond their current terms. The constitutional ineligibility exists only during the term which the member of Congress was holding at

the time of the enactment of the act which "created" the new office or "increased the emoluments" of an old office. It was so held by the Attorney-General in an opinion respecting the eligibility of Senator William S. Kenyon of Iowa during a succeeding term for appointment to the office of Circuit Judge created during a preceding term of the Senator. (33 Opinions of Attorneys-General, page 88.)

The facts were that on February 19, 1919, while Senator Kenyon was serving as United States Senator from Iowa, the salaries of Circuit Judges were increased by Act of Congress. The then current term of Senator Kenyon expired on March 4, 1919. In 1918, Senator Kenyon was reelected, however, and his new term began on March 4, 1919. On January 31, 1922, he was appointed a Circuit Judge in the Eighth Circuit. The salary of the office was increased in one term and the appointment of Senator Kenyon took place in the next term.

Reference to the history of Congressional allowances to Judges, consequent upon (1) resignation and (2) retirement (without resignation) is pertinent.

Since April 10, 1869 (16 Stats. 45), all Federal Judges, including Justices of the Supreme Court, have had the right to an allowance for life upon resigning from office. When the Judicial Code was adopted on March 3, 1911, the provision for an allowance to a resigning Judge was incorporated as Section 260. By act approved February 25, 1919 (40 Stats. 1157), Section 260 was amended so as to provide for the retirement (as distinguished from resignation) of Federal Judges other than Justices of the Supreme Court, and for a retiring allowance to such retiring Judges for the balance of their lives, in an amount equal to the salary received by them at the date of retirement.

The reason for the amendment so as to provide for retirement and a retirement allowance, as distinguished from a resignation with attendant allowance is clear.

There is a vital distinction between a resignation of a Judge or other officer, and his retirement. By resignation, an officer ceases to be such; by retirement, his status as such officer continues, but he is relieved from the active duties of the office.

See "Army", 5 Cor. Jur., pp. 313-315.

Also, Booth v. United States, 291 U. S. 339 (1934), later dealt with.

This distinction between resignation and retirement is all important, because different consequences ensue. For example,

Section 1 of Article III of the Constitution provides, among other things, as follows:

> "The Judges, both of the supreme and inferior courts, shall hold their offices during good behavior, and shall at stated times receive for their services, a compensation, which shall not be diminished during their continuance in office."

By reason of this provision, the Congress has no power to decrease the compensation of a Federal Judge while he remains in office, even to the extent of imposing an income tax thereon (Evans v. Gore, 253 U. S. 245). If, however, by resignation, the "continuance in office" of a Judge ceases, the Congress has power to reduce any statutory allowance made to him to attend upon his resignation. This happened in the case of Mr. Justice Holmes, who resigned his office of Justice of the Supreme Court. (There was no provision at the time for retirement.) The Congress also has power to levy an income tax upon the allowance of a resigned Judge, no constitutional provision forbidding it.

On the other hand, in retiring a Judge does not lose his status as Judge, but continues to hold the same "during good behavior" (i. e., during life), and hence his retiring allowance cannot be diminished by the Congress (either by direct diminution or by levy of an income tax thereon) in view of the constitutional provision quoted above. (Evans v. Gore, supra; Booth v. United States, supra.)

The Booth case involved an Act of Congress which had attempted to decrease the retiring allowance of retired Federal Judges. Judge Booth, Circuit Judge, and Judge Amidon, District Judge, who had retired under the above mentioned Act of February 25, 1919 (but had not resigned), brought suit to recover the amounts of which they had been deprived by the Act of Congress. The Judges claimed that, despite their "retirement", they still held office as Circuit Judge and District Judge, respectively, and that the above quoted provision of Section 1 of Article III forbade decrease of their compensation. The Supreme Court, in a unanimous decision, upheld the contention of the Judges (Booth v. United States, supra), and decided that neither of the Judges by retiring (without resigning) had vacated his office or ceased to be a Judge, and, in consequence, the compensation of each Judge was protected against diminution by Section 1 of Article III of the Constitution above quoted,

and that the statute which had attempted to decrease their salaries was unconstitutional.

The Court drew the distinction between a "retirement" and a "resignation" and pointed out the consequences of each, respectively, to be as above stated.

It follows that the members of the present Congress are ineligible to appointment to the Supreme Court during their current terms.

The situation may be summarized as follows:

1. The "office" to which the appointment will be made, as occasioned by the retirement of Mr. Justice Van Devanter, was "created" by the present Congress; and

2. The "emoluments" of the office which the appointee will fill have been "increased" by the present Congress.

The reasons for these conclusions may be briefly put:

(a) Under Booth v. United States, 291 U. S. 339, a Justice who "retires" (without resigning) does not vacate his office as Justice, but continues to hold the same. His retirement merely relieves him from active service as a condition to receiving the compensation of the office. This being true, the appointee to "succeed" the retired Justice will in no true sense be a successor of the retiring Justice, but rather the holder of an additional office. For example, the so-called "successor" of Mr. Justice Van Devanter will be a tenth Justice of the Supreme Court. He will be in active service, whereas Mr. Justice Van Devanter (still holding the office of Justice of the Supreme Court) will not be in active service.

(b) The Act of March 1, 1937, annexed to the office of Justice of the Supreme Court (by whomsoever held) a new right or advantage, which did not exist before, namely, a right to retire at the age of seventy, subject to the conditions of the statute, and to receive full salary thereafter, without the obligation of rendering any service. This exemption from service as a condition to receiving salary is an "emolument" of the office, as much so as an increase in the fixed compensation during service would be. The retiring allowance itself is part of the compensation of the retiring Justice.

> ". . . pensions and retiring allowances are part of the compensation of public officials" (Scheffelin v. Berry, 216 N. Y. S. 367, 374, per Judge [now Senator] Wagner).

The newly created retirement allowance, therefore, is in-

creased compensation to the Justices of the Supreme Court. Thus, in a two-fold aspect, the "emoluments" of the office of Justice of the Supreme Court were "increased" by the Act of March 1, 1937, (1) by the grant of an exemption from service as a condition to receiving compensation, and (2) by a grant of salary (without any longer service) which would, necessarily, be additional salary for past services.

These increased "emoluments" will be enjoyed by Mr. Justice Van Devanter when his retirement becomes effective, because he has availed himself of the statute. But, they are an incident of the office of every other member of the Court, to be enjoyed by them if and when they avail themselves of the statute, which is wholly optional with them.

(N. B.—Since June 6, 1932, the compensation of all Federal Judges taking office after that date is subject to deduction for income tax, and it is expressly provided that the acts fixing their compensation are amended accordingly.)

References:

Booth v. *United States,* 291 U. S. 339 (1934).

"Argument for the Judges" filed in the Supreme Court of the United States, in *Booth* v. *United States,* 291 U. S. 339 (1934).

Section 260 of the Judicial Code, in force March 1, 1937, dealing with the resignation and retirement of Judges.

State v. *Porter,* 1 Ala. 688 (1840), involving the eligibility of member of the Alabama Legislature to appointment to judgeship created by Legislature while he was member thereof. (The Constitution of Alabama has a provision similar to that of the second clause of Section 6 of Article I of the Federal Constitution here under consideration.)

1 Story on the Constitution, Fifth Edition, 1905, pp. 632-635, dealing with the second clause of Section 6, Article I, of the Constitution of the United States.

1 Willoughby on the Constitution of the United States, Second Edition, 1929, pp. 605-607, Secs. 338-339, dealing with second clause of Section 6 of Article I of the Constitution.

33 Opinions of Attorneys-General, p. 88, dealing with eligibility of Senator Kenyon for appointment as Circuit Judge.